TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1267~~ ~~888~~ 570 26

ANNA M. CARPENTER, PLAINTIFF IN ERROR,

vs.

MARIA E. STRANGE, INDIVIDUALLY AND AS EXECUTRIX OF A. P. MERRILL, DECEASED; A. P. STRANGE, ALICE M. MITCHELL, JANE SARAH STRANGE ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED OCTOBER 20, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the said court before you, between Anna M. Carpenter, plaintiff, and Maria E. Strange, executrix and individually, and others, defendants, a manifest error hath happened, to the great damage of the said Anna M. Carpenter, as by complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, 1887, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Memphis, this 17th day of June, A. D. 1887, and 111th of American Independence.

{ Seal of the Circuit Court of the United States for the District of West Tennessee. }

JOHN B. CLOUGH, *Clerk*,
—— ——, *D. C.*

2 Rec'd & filed June 30, 1887.

JNO. W. BUFORD,
Cl'k Sup. C't Tenn., at Jackson.

[Endorsed:] No. —. Circuit court of the United States, western district of Tennessee. Anna M. Carpenter *vs.* Maria E. Strange *et al.* Writ of error. Issued the 17 day of June, A. D. 1887. J. B. Clough, clerk.

Allowed 21 June, 1887.

P. TURNEY,
Chief Justice.

3 Supreme Court of the United States.

Know all men by these presents that we, Anna M. Carpenter, as principal, and R. Dudley Frayser and Thomas M. Scruggs, as sureties, are held and firmly bound unto Maria E. Strange, as executor of the last will and testament of A. P. Merrill, deceased, and in her own individual capacity, A. P. Strange, Alice M. Mitchell, Jane Sarah Strange, Lydia Creighton, A. P. Merrill, and Wm. N. M. Mer-

rill, in the full and just sum of three thousand dollars, to be paid to the said Maria E. Strange, as executor as aforesaid and individually, and A. P. Merrill and others, their executors or administrators; to which payment, well and truly to be paid, we bind ourselves and each of us, jointly and severally, and our and each of our
4 heirs, executors, and administrators, firmly by these presents.

Signed and sealed with our seals and dated this 17th day of June, A. D. 1887.

Whereas the above-named Anna M. Carpenter hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in an action in which said Anna M. Carpenter is the plaintiff and said Maria E. Strange and the other obligees herein are defendants by the supreme court of the State of Tennessee, sitting at Jackson, Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named Anna M. Carpenter shall prosecute her said appeal to effect and answer all costs and damages if she shall fail to make good her plea, this obligation shall be void; otherwise remain in full force and effect.

5 ANNA M. CARPENTER. [SEAL.]
Per FRAYSER & SCRUGGS, *Sol's.* [SEAL.]
R. DUDLEY FRAYSER. [SEAL.]
THOMAS M. SCRUGGS. [SEAL.]

I, as clerk of the circuit court of the United States at Memphis, Tennesse, do certify that each of the sureties to the foregoing bond is worth the sum of the penalty thereof over and above his debts and liabilities.

JOHN B. CLOUGH,
Clerk of said Court.

MEMPHIS, TENNESSEE, *June* 17, 1887.

Approved 21 June, 1887.

P. TURNEY,
Chief Justice Sup. C't Tenn.

Filed June 30th, 1887.

JNO. W. BUFORD,
Clerk Sup. C't Tenn., at Jackson.

6 United States of America to Maria E. Strange as executrix and individually, A. P. Strange, Alice M. Mitchell, Jane Sarah Strange, Lydia Crighton, A. P. Merrill, and Wm. N. M. Merrill, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October, 1887, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Tennessee, wherein you are defendants and Anna M. Carpenter is plaintiff, to show cause, if there be any, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Peter Turney, chief justice of the
7 supreme court of Tennessee, this 21st day of June, 1887.

P. TURNEY,
Chief Justice Sup. C't Tennessee.

Filed June 30, 1887.

JNO. W. BUFORD,
Cl'k Sup C't Tenn., at Jackson.

8 Chancery Court of Shelby County.

STATE OF TENNESSEE, *Shelby County,* } *ss:*

Pleas before the Hon. W. W. McDowell, chancellor of the chancery court of Shelby county, held in Memphis, and State and county aforesaid, and at the April term thereof, 1882.

Be it remembered that heretofore, to wit, Feb'y 2d, 1881, Anna M. Carpenter filed her bill of complaint against M. E. Strange *et al.* in the court aforesaid in the words and figures following, viz:

In the Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER, Complainant,
vs.
9 MARIA E. STRANGE, ex'tx of the last will and testament of Ayres P. Merrill, dec'd, and individually; Ayres P. Strange, a minor; Alice M. Mitchell, of Shelby county, Tennessee; Fanny Mitchell, a minor, and resides in the State of Alabama; Jane Sarah Strange, known as "Lizzie" Strange, a minor, and Lydia E. Crighton, a minor, of Shelby county, Tennessee, and Ayers P. Merrill, of Pittsfield, Massachusetts, and William N. M. Merrill, of Stratford, Connecticut. } 3912.

To the Hon. W. W. McDowell, judge, &c.:

Complainant represents unto your honor that Ayres P. Merrill departed this life in the city of New York, N. Y., on the —
10 day of Nov., 1873; was a citizen thereof at his death, and he left a last will and testament. Said will was duly probated in the county of New York, State of New York, in Feb., 1874, by the surrogate thereof, and Maria E. Strange, the defendant, qualified as ex't'x thereof, she being then a resident of New York, and being nominated and appointed as such in said will. She gave no bond or security, the will especially releasing her from giving same. At the January term, 1881, of the probate court of Shelby county, Tennessee, the defendant, Maria E. Strange, probated said will in this State; was appointed by said court and she qualified as ex'tr'x of said will, and has entered upon her trust as such.

11 A copy of said will is here filed and marked Ex. A to this bill, but need not be copied.

Complainant represents she is a legatee under said will of the "western portion of a double tenement house purchased by the testator from Adlai O. Harris, being No. 98 on Madison street, Memphis, Tenn., to be held and used by complainant, with all the income to be derived therefrom, during her natural life," with a proviso that the complainant "renounce all claim upon the testator's estate for moneys accruing from the sale of a tract of land in Illinois conveyed to said testator in trust for complainant's benefit by Dr. W. N. Nercer." * * *

12 Complainant represents she has never renounced her claim upon the testator's estate and has never claimed anything under said will or received anything.

Complainant further shows unto your honor that she is a creditor of the said Ayres P. Merrill's estate on account of the trust funds aforesaid received by said Merrill in his lifetime, and said claim has been reduced to judgment in a suit brought by complainant *vs.* Maria E. Strange, exec'x of Ayres P. Merrill's estate, in the supreme court of the county of New York and State of New York, and said judgment is for the sum of $16,436.70. A certified copy of the record in the said case showing the suit and recovery of said judgment is here filed and made Ex. "B" to this bill and prayed to be taken as a part thereof, but need not be copied.

13 Complainant represents that the devisees and legatees under said will are made party defendants to this bill, and complainant, upon information and belief, charges that all have been paid or their specific legacies turned over to them, respectively, by said Maria E. Strange, ex'tr'-. The minor defendants have no regular guardian.

Complainant represents that Maria E. Strange took possession of the testator's property whereever it lay soon after his death, especially the real estate hereinafter described belonging to said testator. Complainant, being informed that defendant had qualified as ex'tr'x in this county and State, filed her bill, #1805 R. D., on the 15th January, 1875, against Maria E. Strange, as ex'tr'x, in this court

14 to recover the amount due from her testator on account of said trusts referred to in his will, and, among other things, sought to attach the real estate of the testator, and charging that M. E. Strange was a non-resident of Tennessee, and that the testator at his death was also a non-resident. The real estate was attached under said proceedings and a receiver appointed to collect the rents, &c.

The said proceedings, # 1805 R. D., of this court sought to impound the real estate of A. P. Merrill, dec'd, and hold same subject to a judgment that was sought to be recovered in the State of New York against the estate and Maria E. Strange, ex'tr'x, who was a non-resident. Said suit, # 1805 R. D., was really ancillary

15 and auxiliary to the suit in New York; that judgment was recovered, and is the same as that referred to in Ex. B, and there is no need of proceedings under # 1805 to recover judgment under same. Subsequently the mansion house, # 59 Madison street, was released, to wit, on the — day of ——, 187–. The other property, No. 98 Madison street (the same devised to complainant with

the provision in said will as aforesaid) and No. 100 Madison street, has been in charge of the receiver since the — day of ——, 187–, and is in charge of a receiver at the present time. Maria E. Strange, the ex't'x, collected the rents of all the real estate in Shelby county, Tennessee, from the time of her testator's death to the appointment of the receiver and since his discharge.

16 As to #59 Madison street, she has been collecting the rents as to that property. The said Maria E. Strang claimed #59 Madison street under a deed made to her by A. P. Merrill in his lifetime, to wit, on the — day of Dec., 1867, but the court of New York in the suit referred to herein, as will be seen from an inspection of Ex. B, declared said deed void and fraudulent; so the defendant, Maria E. Strange, has no right to the possession of said property under and by virtue of said deed or the rents of the same. The real estate is not sufficient to pay complainant's judgment. Maria E. Strange is a woman of little or no means, and it will be necessary to apply the rents of all the real

17 estate to the satisfaction of complainant's judgment, as the real estate will not be sufficient to pay same. The defendant, Maria E. Strange, is now acting as executrix of said A. P. Merrill's estate in Tennessee, she having removed to Tennessee since the filing of the bill, #1805 R. D., referred to in this proceeding.

Complainant is a creditor of the estate of A. P. Merrill, deceased, in the sum of over $16,000 by judgment recovered in the supreme court of New York county, New York, and the record of said judgment, duly authenticated and certified, she files herein as Ex. B, and she seeks to recover on said judgment just as if specially sued on in a law court.

Said judgment is still owned by complainant and is un-

18 satisfied and unpaid, together with cost and interest. Complainant believes there are other creditors of said estate, the names of whom and the amounts due same she has not been able to learn.

Complainant charges that the suggestions of the insolvency of the estate of A. P. Merrill, deceased, has been duly made in the county court of Shelby county, Tennessee; that the personalty has been exhausted in the payment of debts, and there remains nothing save the real estate to pay the debts due. The estate, real and personal, exceeds the value of one thousand dollars.

Complainant files this bill in behalf of herself and all other creditors and persons interested in the estate who may wish to come in and be parties herein.

19 Complainant represents that the said Ayres P. Merrill died seized and possessed of the following real estate lying and being in the State of Tennessee and Shelby county: East part of lots #355 and #356, 35 x 148½ feet, on south side of Madison street. The same purported to have been conveyed to Maria E. Strange by Ayres P. Merrill, by deed Dec. 3d, 1867, and recorded in book 98, page 170, register's office, Shelby county, Tennessee, which deed was pronounced null and void; wherefore real estate, by virtue of Ex. B herein, has become assets of said estate and liable to the pay-

ment of debts; also the west half of lot #13 in original lot #480, beginning on the north side of Madison street, 148½ ft. east of an alley next east of Third street; thence east with Madison
20 street 74½ —; thence north 156¾ feet; thence west 74½ feet; thence south 156¾ feet to the beginning, lying in Shelby Co., Tennessee.

The premises considered, complainant prays that the parties set out in the caption as defendants and who are the heirs of A. P. Merrill, deceased, devisees and legatees under his will and interested in the lands of the testator, be made such by copy and subpœna; publication as to non-residents be made; that they appear, plead, answer, or demur to this bill; that a guardian *ad litem* be appointed for the infant defendants; that the administration and settlement of the estate of Ayres P. Merrill, deceased, be transferred from the county court to this honorable court; that an ac-
21 count of the assets and liabilities of the estate be taken and a settlement be had with Maria E. Strange, ex'tr'x, and she pass her accounts and settlements in this court; that the defendant, Maria E. Strange, be made to account for the money left her in trust for Alice Moore Mitchell, Lydia E. Creighton, and one W. B. Mitchell, who is now deceased; that Wm. N. M. Merrill, Ayres A. Strang, "Sazie" Strange, and Alice M. Mitchell, legatees under this will, account for the legacies turned over to them, and they and all other legatees be postponed until the debts due from the estate be paid; that all creditors and others interested be permitted to become parties to this proceeding; that the clerk and master make
22 publication for all creditors to file their claims on or before the 15th of May, 1881. Complainant prays that the judgment recovered herein as per Ex. B be allowed and a decree rendered on said judgment against the estate of A. P. Merrill, deceased, and that the real estate described herein be sold to pay complainant's claim, and also any other *bona fide* debts and charges against the estate.

Complainant further prays that the receiver now in charge of the property on the north side of Madison street be put in charge of the property on the south side of Madison street—#55 Madison street—purported to have been deeded to Maria E. Strange, and *the* he be authorized to collect the rents, pay the taxes, insure the prop-
23 erty, and keep the same in repair, and the ~~receiver in~~ the attachment bill #1805 be made and continued receiver herein; that as A. P. Merrill has deceased, and there will be a necessity for a new trustee to act in his stead and manage the trust fund recovered for complainant in the suit in New York, referred to in Ex. B herein; that this court appoint a proper and suitable person to act as trustee for complainant, and the *corpus* of the trust fund as particularly designated in Ex. B be paid to the trustee appointed by this court, and the said trustee manage said fund under the control and supervision of this court and the profits or increase be paid complainant or her attorneys.

24 Complainant prays that she be granted all further special and general relief she may be entitled to under the premises,

and if she is mistaken as to the relief asked for herein that your honor may grant her the relief that may be proper and meet; and she will ever pray.

ANNA M. CARPENTER.

JARNAGIN & FRAYSER.

R. Dudley Frayser, att'y, being duly sworn, says that the facts in above bill stated of his own knowledge are true, and those stated on the information of others he believes to be true.

R. DUDLEY FRAYSER.

Sworn to and sub- before me Feb. 2, '81.

R. J. BLACK, *C. & M.*

Cost Bond.

25 We, Anna M. Carpenter and s'ty R. Dudley Frayser, acknowledge ourselves indebted to Maria E. Stange, ex., — *al.*, in the sum of two hundred and fifty dollars, to be void if the said Ann M. Carpenter, complainant in a bill which has this day been filed in the chancery court of Shelby county against the said M. E. Strange, ex., *et al.*, shall pay all such costs as may be awarded against her by the court in its decrees and orders in said cause.

This 2 day of Feb'y, 1881.

ANN M. CARPENTER,
By R. DUDLEY FRAYSER.
R. DUDLEY FRAYSER.

EXHIBIT "A."

Be it known that I, Ayres Phillips Merrill, M. D., do make and
26 declare this to be my last will and testament, hereby revoking all others previously made:

First. I will and bequeath to my daughter, Anna Mercer, the western portion of the double tenement purchased of Addie O. Harris, being the house and lot numbered ninety-eight (98) on Madison street, in Memphis, Tennessee, to be held and used by her, with all the income derived therefrom, during her natural life, but upon condition that she renounce all claim upon my estate for monies accruing from the sale of a tract of land in Illinois conveyed to me in trust for her benefit by Dr. W. N. Mercer, a considerable portion of which monies were lost by deprec-ation during the late war, the balance paid over to the late Walter Goodman, then her
27 trusted friend and agent, to be invested for her benefit in Mississippi. At her decease or upon her declining the conditions as above, then my will is that said property be sold for the benefit of the daughters then surviving of my several daughters.

Second. I will and bequeath to my daughter, Maria E. Strange, and to her heirs and assigns forever, without the control — her husband should she marry again, the house and lot numbered fifty-nine (59) on Madison street, Memphis, Tennessee, being the same for-

merly occupied by me as my family residence; also all my personal property of every kind and description, to be taken possession of by her at my decease, without inventory or appraisement.

28 Third. I will and bequeath to my said daughter, Maria Elizabeth Strange, in trust, one thousand dollars each for the benefit of the several daughters of my daughters Sarah and Eugenia, deceased, surviving me, namely, Alice Moore and Fanny Mitchell and Liddie Eugenia Creighton, and one hundred dollars for the benefit of my grandson, Wm. B. Mitchell, Jr., should he survive me, to be employed and invested at the discretion of the said Maria E. Strange.

Fifth. I appoint my daughter, Maria Elizabeth Strange, to be sole executrix of this my last will and testament without any security to be required of her for the faithful performance of her duties as such, and I request that she will give the watch presented me

29 by Dr. Mercer to my son Mercer, my own watch to Ayres A. Strange, my mosaic casket to Sazie Strange, my signet to Alice Moore Mitchell.

Fourth. All the property may be sold for the benefit of my own children equally who may survive me.

In witness whereof I have hereunto set my hand and seal, in the city of New York, this twenty-second day of June, eighteen hundred & seventy-one.

A. P. MERRILL. [L. S.]

Signed, sealed, published, and declared to be his last will and testament by the aforesaid Ayres P. Merrill in presence of us, the undersigned, who, in his presence, at his request, and in the presence of one another, subscribed our names as the witnesses

30 the day and year above written in the said city of New York.

HENRY TALMADGE.
HENRY P. TALMADGE.
I. H. TALMADGE.

EXHIBIT "B." Filed Feb'y 2, '81. R. J. Black C. & M.

The people of the State of New York, by the grace of God free and independent, to all to whom these presents shall come, Greeting:

Know ye that we, having examined the records and files in the office of the clerk of the county of New York and clerk of the supreme court of said State for said county, do find a certain

31 judgment roll there remaining in the words and figures following, the same being a full and perfect record, to wit.

[SEAL.] —— ——.

Amended Summons.

Supreme Court, New York County.

ANNA MERCER CARPENTER, Plaintiff,

vs.

MARIA E. STRANG, Executrix, &c., of Ayres P. Merrill, and WILLIAM N. M. MERRILL, Defendants.

To the above-named defendants:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
32 the day of service, and, in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated nineteenth March, 1878.

GEORGE NORRIS,
Plaintiff's Attorney.
T. D. P.

Post-office address: 206 Broadway; office, No. 206 Broadway street.

New York Supreme Court, County of New York.

ANNA MERCER CARPENTER

vs.

MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayres P. Merrill, Deceased, and WILLIAM NEWTON MERCER MERRILL.

The plaintiff above named, by this her amended complaint,
33 complaining of the above-named defendants, alleges that William Newton Mercer Merrill, one of the above-named defendant-, was requested to join the plaintiff as coplaintiff, but has declined so to do, and that he is made a defendant herein; that the defendant, Maria E. Strange, is the executrix of the last will and testament of Ayres P. Merrill, deceased; that the said Ayres P. Merrill deceased in the month of November, 1873; that the will of the said Ayres P. Merrill was admitted to probate by the surrogate of the county of New York in the month of February, 1874, a copy of which is hereto annexed, and the plaintiff prays that it may be made
34 part of this her amended complaint for the purpose only of showing to the court the execution of the same; that the will was duly admitted to probate; that the bequests were therein made; that the defendant was made executrix thereof.

And plaintiff prays that the words in said will used by the testator, as follows, "a considerable portion of which monies were lost

by depreciation during the late war and the balance paid over to the late Walter Goodman, then her trusted friend and agent, to be invested for her benefit in Mississippi," may not be taken and held as part of this plaintiff's amended complaint or that the plaintiff admits the truth of said declaration, and this plaintiff alleges that the same is wholly untrue and put into said will for wrong and corrupt purposes.

And the said plaintiff further alleges that the said Anna Mercer Carpenter, plaintiff aforesaid, and the said Maria E. Strange, executrix, defendant aforesaid, are the daughters of the said testator, Ayres P. Merrill.

And the said plaintiff further alleges and shows to this honorable court that, on the 3d day of April, 1857, Dr. William Newton Mercer, in consideration of love and affection for the said plaintiff and of the fact the *the* said plaintiff was named for the wife of the said Dr. William Newton Mercer, and befor- the marriage of the said plaintiff, conveyed by deed to said Ayres P. Merrill in trust a certain lot of land lying and being in the county Macoupin and State of Illinois, and known as the north half of section nine (9), in township eight (8) north, of range (8) west, of the third (3d) principle meridian, containing three hundred and twenty (320) acres.

And the said plaintiff further alleges and shows to the court that said deed of trust conveyed the said land aforesaid to the said Ayres P. Merrill aforesaid in trust for the sole and separate use and benefit of the said plaintiff, and that said deed was duly executed and delivered to said Ayres P. Merrill and duly recorded by him; and the said plaintiff alleges that said deed of trust, wherein it declares the purposes and considerations of said deed, is as follows, to wit:

"But the conveyance is nevertheless made in trust for the following uses and purposes and none other: The said Ayres Phillips Merrill shall hold the property herein conveyed to the sole and separate use and benefit of his daughter, Anna Mercer Merrill, and the heirs of her body, and free from the control, debt, liabilities, or contract of her husband, should she hereafter marry, and the trustee shall have power, whenever he may deem it expedient and proper, to sell and dispose of said trust estate or any part thereof and the proceeds to invest in any other real or personal estate in Illinois or elsewhere; and the estate so purchased shall be held by the trustee for the same uses and purposes and upon the same trusts as are declared in and by this indenture of and concerning the property herein conveyed, and the same may be sold and the proceeds reinvested from time to time in trust and manner aforesaid; and in the event of the death of the said Anna Mercer Merrill leaving no surviving issue the property herein conveyed or the proceeds thereof shall descend to her brother, William Newton Mercer Merrill, and shall be held by said trustee or his successor for the use and benefit of the said William Newton Mercer Merrill upon the same conditions and trusts hereinbefore declared; and the said trustee shall have further power to

appoint a successor in the trusts hereinbefore declared by will or such conveyance as in his discretion he may deem expedient."

And this plaintiff alleges that said Ayres P. Merrill, as trustee aforesaid, took possession of said three hundred and twenty (320) acres of land and held the same by virtue of said deed of trust only for the benefit and uses so set forth in the said deed of trust, and the plaintiff asks that a copy of said deed of trust, hereto annexed and marked Exhibit "A," may be taken and made part of this her said amended bill of complaint.

40 And the said plaintiff further alleges that on the fifth (5) day of March, in the year of our Lord 1861, as this plaintiff is informed and believes, the said Ayres P. Merrill sold and conveyed to one D. H. Combs one-half of said section, "to wit," the northeast quarter of section nine (9), township eight (8), and range 8 west of the third (3) principal meridian, in said State of Illinois, and that the consideration mentioned in said deed is the sum of three thousand ($3,000) dollars; that fifteen hundred (1,500) dollars was then and there paid to said trustee, Ayres P. Merrill, by the said Combs in the lawful money of the United States; that a mortgage was then and there given, bearing interest, to said

41 Ayres P. Merrill, trustee, by the said purchaser, Combs, for the balance of said three thousand (3,000) dollars purchase-money, to wit, the sum of fifteen hundred dollars ($1,500); and this plaintiff further alleges that the aforesaid mortgage, principle and interest, was duly paid on or before the 29th day of April, 1863, to said Ayres P. Merrill; and this plaintiff further alleges that on the 5th day of April, 1864, the said Ayres P. Merrill, trustee as aforesaid, sold and conveyed to Samuel Snedecker and Isaac Snedecker the other half part of said three hundred and twenty (320) acres, to wit, the northwest quarter of section nine (9), township eight (8) north, and range eight (8) west, of the said third (3) principle meridian

42 for the sum of three thousand two hundred ($3,200) dollars; and plaintiff is informed and believes by the records of said transaction that said Ayres P. Merrill, trustee as aforesaid, received at the date of the sale above mentioned the sum of eight hundred dollars (800) in lawful money, and that a mortgage for the balance of two thousand four hundred ($2,400) dollars, bearing interest, was duly executed to said Ayres P. Merrill, and to him delivered, and that on or about the fifteenth day of April, 1864, the principle and interest of said mortgage was duly paid in lawful money to Ayres P. Merrill, trustee, and plaintiff asks that a copy of the record of deeds of the county of Macoupin and State of Illinois may be

43 taken and made part of this her said amended bill of complaint. A copy of said record is hereto annexed and marked "Exhibit B."

And plaintiff further alleges that said Ayres P. Merrill did not keep said money so received for the sole and separate use of this plaintiff, and, in case this plaintiff should die without issue, for the sole and separate use of William Mercer Newton Merrill.

And plaintiff alleges that said trustee, in breach of said trust, converted said money to his own use, and that the same became ab-

sorbed in his own business and materially enhanced the value of his estate. The plaintiff further shows that in the year 1860 she became a widow by the death of her husband, Samuel Carpenter; that, as an affectionate daughter, in deed affliction, she looked to her father, the said Ayres P. Merrill, as her natural adviser, to whom she owed implicit obedience and in whom she reposed unquestioned trust; that, in November, 1873, said trustee, Ayres P. Merrill, died; that, during his lifetime he did not render an account to — of the trust estate; that this plaintiff is left in utter ignorance of what the said Ayres P. Merrill has done with said money unless the same has been used as aforesaid.

That Ayres P. Merrill left by said will a large real estate, of great value, in the city of Memphis and State of Tennessee; that it is believed to be worth from seventy-five thousand (75,000) dollars to one hundred and twenty-five thousand ($125,000) dollars; that he left by said will a large sum of money and personal property in the city of New York; that all the personal property and nearly all the real estate were left to Maria E. Strange.

That the said plaintiff at various times during the lifetime of said testator came to said — and placed in his hands in trust for her large sums of money, to wit, the sum of four thousand dollars, which sum of money, as this plaintiff is informed and believes, was invested in part or wholly in the real estate aforesaid, of which said testator died seized and which went to make up said estate; that said testator never paid to said plaintiff this last-mentioned sum of money.

And this plaintiff further alleges that said Ayres P. Merrill bequeathed to this plaintiff "the western portion of the double tenement house purchased of Addie O. Harris, being the house and lot numbered ninety-eight (98), on Madison street, Memphis, Tennessee, to be held and used by her, with all the income to be derived therefrom, during her natural life;" that said bequest is made upon the condition that the said plaintiff renounce all claim upon (my) said testator's estate for monies accruing from the sale of a tract of land in Illinois conveyed (to me) to said testator in trust for (her) this plaintiff's benefit by Dr. W. N. Newton Mercer, and asks that a copy of said will, hereto annexed and marked "Exhibit C," may be taken and made part of her amended bill of complaint.

And plaintiff further shows that she has not renounced said claim so as aforesaid required to do, nor has she refused to renounce said claim for the reason that plaintiff claims that by virtue of the deed of trust it is impossible for plaintiff to release said trust funds, and for the further reason that such a condition as aforesaid required is against conscience and justice.

And this plaintiff further alleges that, well knowing that she, the said plaintiff, would be left penniless by such cruel and unlawful conditions imposed upon her by her said trustee and at the mercy of the said Maria E. Strange, and well knowing the weak and feeble state of the said testator, the said Maria E. Strange, with undue influence over the said testator, alienated the

said testator's affections from this plaintiff and induced said testator to attempt to commit this cruel fraud upon her; that this plaintiff is without means of support, and that said life estate is of little value.

And plaintiff further alleges that the said Maria E. Strange is now, by the death of said Ayres P. Merrill and by the will, successor of the said Ayres P. Merrill as trustee of said funds; that said Maria E. Strange is utterly unfit for said position; that her interests is opposed to the interest of this plaintiff by the operation of the will.

49 And this plaintiff further alleges that at the time of the death of the said testator this plaintiff is informed and believes said testator was free from debt, except the claim and liability of this plaintiff for the money held by him in trust as aforesaid, and the money so as aforesaid loaned, advanced, or put into his hands in trust and a balance due William Newton Mercer Merrill, the son of the said testator, for a similar amount of money held in trust for the use of said William Newton Mercer ——, simultaneously created with the trust to this plaintiff; and the said executrix refuses to account for both and each of these sums of money, denies the liability of the estate for the same, and refuses to treat said sums as a valid and subsisting indebtedness and refuses to pay

50 the same or any portion thereof; that if any debts existed against said estate the plaintiff is informed and believes the same have been paid, except as aforesaid.

And this plaintiff further alleges that the said Maria E. Strange, executrix as aforesaid, in proving the said will of the said testator, claimed and so pretended and declared the fact to be that she, the said Maria E. Strange, in her personal capacity as devisee under the said will,—the property described in said will as especially devised to her, and known as the homestead of the said testator and described in a copy of the deed hereto annexed and marked "Exhibit D," which the plaintiff prays may be taken and made part of

51 this her amended complaint; that said Maria E. Strange, as executrix and in her personal character, surpressed the publication or notice of the fact that a deed of said property was — aforesaid made to her.

And this plaintiff further alleges that said deed, if obtained at all from the said testator, was so obtained by collusion with the said testator, and for the fraudulent purpose of defeating the collection of the claim of the plaintiff's just and legal claim against the estate of the said testator, and to take so much of his estate as said property represents from liability to said claim, and plaintiff alleges and charges that said deed or conveyance was made without any valuable consideration in law.

The plaintiff further alleges that said deed or conveyance,

52 if made at all, was made while said trust existed, and was a just claim and lien against testator's estate; that the said Maria E. Strange had notice and knowledge that said trust existed as a subsisting lien against said estate at the time, before and since said deed or conveyance was made, if made at all; wherefore plaintiff prays this honorable court—

First. That if, in the judgment of this court, it shall be deemed advisable, that this honorable court appoint a suitable and proper person as trustee of the said trust funds.

Second. That this honorable court may adjudge and decree that the bequests of said life estate in and of said — so as aforesaid
53 bequeathed be taken and held free from all and every condition thereunto attached in said will; that the said condition be decreed as void, and that the title to the life estate be absolutely vested in this plaintiff, and she be relieved from renouncing any claim for said trust money, and that the trust estate be declared unaffected by said condition in said will and a charge upon the estate of the said testator.

Third. That the said Maria E. Strange, executrix, be compelled to account for and pay over to the said plaintiff the rents and profits received by her since the demise of the testator of said house.

Fourth. That this honorable court will decree that said
54 deed or conveyance from said testator to said Maria E. Strange be set aside and declared to be inoperative and void and of no effect as against the claims of this plaintiff's *cestui que trust* against said estate of the said testator, and the sums of money found due or to be found due this plaintiff be made a lien on said homestead so set forth in said deed or conveyance and described in said will, and that said decree be enforced against the same.

Fifth. That this honorable court will be pleased to decree that the said executrix, Maria E. Strange, be compelled to account, as the representative of the said Ayres P. Merrill, trustee, *trustee* to
55 the said plaintiff, as *cestui que trust* for said monies so held by said Ayres P. Merrill in trust for said plaintiff, and that a referee be appointed for that purpose, and that some suitable person be appointed as trustee in the place of Ayres P. Merrill, deceased, to carry out and maintain said trust so as aforesaid created by the said Dr. Wm. Newton Mercer by said deed of trust.

Sixth. That on the appointment of said referee and the rendering of said account that the said sums so reported as due shall be paid over to the said trustee so appointed or to the said *cestui que trust*, as this court shall direct and decree as being due and
56 held for the benefit of said *cestui qui trust*, said plaintiff.

And plaintiff prays that she may have such further and other order and relief as to this honorable court shall seem just.

GEORGE NORRIS,
Attorney for Pl'ff, 206 *Broadway*.

COUNTY OF NEW YORK *ss:*

Anna Mercer Carpenter, being duly sworn, doth depose and say that she is the plaintiff herein; that she has read the foregoing amended complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to
57 those matters she believes it to be true.

ANNA MERCER CARPENTER.

Sworn to before me this 19th day of March, 1878.

W. R. BEACH,
Notary Public, N. Y. Co.

EXHIBIT A.

This indenture, made and entered into between William Newton Mercer, of Laurel Hill, in Mississippi, of the first part, and Ayres P. Merrill, of Memphis, Tennessee, of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of ten dollars to him paid by the said party of the second part, the receipt whereof is hereby acknowledged, and in
58 consideration of the conditions to be set forth in this deed, has granted, bargained, sold, and conveyed and by these presents doth grant, bargain, sell, and convey to the said party of the second part, his heirs and assignes, all that certain tract of land situated and lying and being in the county of Macoupin, in the State of Illinois, known and designated as follows, to wit: The north half of section nine (9), township eight (8) north, range eight (8) west of the third principal meridian, except that part of said half section heretofore deeded to or owned by the Chicago, Alton and St. Louis Railroad Company; to have and to hold the aforesaid tract or parcel of land, together with all and singular the privileges and appurtenances thereunto belonging or in any-
59 wise appertaining, to the only proper use and benefit of the said party of the second part, his heirs and assignes forever; and the said party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part that he is lawfully seized, has full right to convey, and will forever warrant and defend the said tract of land from the claim of him, the said party of the — part, his heirs and assignes, and against the claim or claims of any other person whomsoever claiming by, through, or under him, but against no other claims whatever.

But the conveyance is nevertheless made in trust and for the following uses and purposes and none other: The said Ayres
60 Phillips Merrill shall hold the property herein conveyed to the sole and separate use and benefit of his daughter, Anna Mercer Merrill, and the heirs of her body, and free from the control, debts, liabilities, or contracts of her husband, should she hereafter marry; and the trustee shall have power, whenever he may deem it expedient and proper, to sell and dispose of said trust estate or any part thereof and the proceeds invest in any other real or personal estate in Illinois or elsewhere, and the estate so purchased shall be held by the trustee for the same uses and purposes and upon the same trusts as are declared in and by this indenture of and concerning the property herein conveyed, and the same may be
61 sold and the proceeds reinvested from time to time in trust in manner aforesaid, and, in the event of the death of the said Anna Mercer Merrill, leaving no surviving issue, the property herein conveyed or the proceeds thereof shall descend to her brother, William Newton Mercer Merrill, and shall be held by said trustee

or his successor for the use and benefit of the said William Newton Mercer Merrill upon the same conditions and trusts hereinbefore declared, and the said trustee shall have further power to appoint a successor in the trusts hereinbefore declared by will or by such conveyance as in his discrition he maw deem it expedient.

In witness whereof I, the said W. Newton Mercer, hereunto subscribe my name and affix my seal, at New Orleans, in the
62 State of Louisiana, this 3d day of April, A. D. 1857.

W. NEWTON MERCER. [SEAL.]

Witnesses:
H. M. PALFREY.
EDWARD G. STINART.

STATE OF LOUISIANA, *City of New Orleans:*

Be it remembered that on this the twenty-fifth day of November, one thousand eight hundred and fifty-seven, before me, George Rareshide, a commissioner for the State of Illinois, residing in the city of New Orleans, in the State of Louissiana, duly commissioned and qualified by the executive authority and under the laws of said State of Illinois to take the acknowledgement of deeds and other
63 instruments of writing to be used or recorded therein, personally came and appeared William Newton Mercer, to me personally known to be a party named in and who executed the foregoing conveyance, and acknowledged that he had signed, sealed, and delivered the same as his own voluntary act and deed for the uses and purposes therein mentioned on the day and date therein set forth.

In witness whereof I hereunto set my hand and affix my official seal, at New Orleans, the day and year first above written.

[SEAL.] G. RARESHIDE,
Commissioner.

UNITED STATES OF AMERICA, } ss:
State of Illinois, }

64 I, O. M. Hatch, secretary of state of the State of Illinois, do hereby certify that George Rareshide, Esqr., before whom the acknowledgment of the foregoing instrument was taken, is now and was at the time of the taking thereof a commissioner of said State in and for the city of New Orleans, in the State of Louisiana, duly authorized and empowered by law to take the same; that I have compared the signature of the foregoing certificate and the impression of his seal thereto attached with the signature of said commissioner and the impression of his seal deposited in my office, and verily believe the same to be genuine.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at Springfield, this 17th day of
65 December, A. D. 1857.

[L. S.] O. M. HATCH,
Secretary of State.

Recorded December 28, 1857.

A. McKAINE, *Cl'k.*

STATE OF ILLINOIS, *County of Macoupin :*

I, Henry W. Burton, clerk of the circuit court and *ex officio* recorder of deeds, &c., within and for the county of Macoupin, in the State aforesaid, do hereby certify that the foregoing written pages contain a true and literal exemplification of the record of a deed which was filed and recorded in my office on the 28th day of December, A. D. 1857, in Record K K, in pages 286, 287, and 288, as reference to the record thereof remaining in my office will fully show.

Witness my hand and official seal, at my office in Carlin-
66 ville, in the county and State aforesaid, this 22d day of July, A. D. 1874.

[SEAL.] HENRY W. BURTON, *Clerk, &c.*

EXHIBIT "B."

A showing of conveyances of the north half of section nine and the east half of section fifteen, all in township number eight north, of range number eight west 3d P. M., in Macoupin county, State of Illinois.

Dates—1835, April 28th.

Patents. United States to W. N. Mercer and J. Simington.—Entry of the N. ½ 9 & E. ½ 15, 8, 8 west 3d P. M., Macoupin county, Illinois.

1840, July 18th.

67 Quitclaim deed. John Simington and wife to William Newton Mercer.—Recorded April 15, 1841, Record K, page 547. N. ½ 9 & E. ½ 15, 8, 8, & other lands.

April 3d, 1857.

Sp'l warranty deed. W. Newton Mercer to Ayres P. Merrill, in trust for William Newton Mercer Merrill.—Recorded Dec. 28, 1857, Record "K K," page 284. E. ½ sect. 15, T. 8, R. 8 west, &c. For the sole and separate use and benefit of Wm. N. M. and heirs of his body, &c.

1859, Dec. 28th.

Warranty deed. Ayres Phillips Merrill to Samuel Snedecker & Isaac K. Snedecker.—Recorded Feb'y 25th, 1860, Record O O, page 431. E. ½ sect. 15, town. 8, range 8. For consideration of sum of $6,000.00.

1860, Feb. 23d.

Mortgage for $5,000.00. Samuel Snadecker and Isaac Snedacker to Ayres P. Merrill.—Recorded Feb. 25th, 1860, Record "77,"
68 page 538. E. ½ 15, 8, 8 west, &c. Satisfied May 18th, 1863, by Alf. S. Mayfield, att'y-in-fact, &c.

1861, March 5th.

Warranty deed. Ayres P. Merrill to D. H. Combs.—Recorded April 13th, 1861, Record "X X," page 130. N. E. ¼ 9, 8, 8 west, &c. For consideration $3,000.00.

1861, M'ch 5th.

Mortgage for $1,500.00. D. H. Combs to Ayres P. Merrill.—Recorded April 13th, 1861, Record "L L," page 64, N. E. ¼ sect. 9, 78, R. 8. Satisfied April 29th, 1-63, —— ——, attorney-in-fact, &c.

1863, M'ch 14th.

Power of attorney. Ayres P. Merrill to Alfred S. Mayfield.—Recorded April 27th, 1863, Record "A G," page 40. To enter
69 satisfaction of mortgage from D. H. Combs March 5th, 1-61, & of mortgage from Samuel & Isaac Snedecker Feb'y 3, 1860.

1864, April 5th.

Warranty deed. Ayres P. Merrill to Samuel Snedacker and Isaac Snedacker.—Recorded June 8, 1864, Record A H, pag- 184. N. W. ¼ sect. 9, T. 8, R. 8. For consideration of $3,200.00.

Mortgage for $2,400. Samuel Snedecker & Isaac Snedacker to Ayres P. Merril, trustee.—Recorded Ap'l 29th, 1864, Record "A S," page 90. N. W. ¼ sect. 9, T. 8, R. 8. Satisfied by Q. C. deed as follows:

1866, Oct. 9th.

Deed, quit claim. Ayres P. Merrill to Samuel Snedecker and Isaac Snedacker.—Recorded October 30th, 1866, Record "A
70 P," page 261. N. W. ¼ sect. 9, T. 8, R. 8. To satisfy foregoing mortgage.

Attest: H. W. BURTON,
Circuit Clerk and Ex Officio Recorder of Deeds, &c., Macoupin County, Illinois.

EXHIBIT C.

Be it known that I, Ayres Phillips Merrill, M. D., do make and declare this to be my last will and testament, hereby revoking all others previously made.

First. I give and bequeath to my daughter, Anna Mercer Carpenter, the western portion of the double tenement purchased of Addie O. Harris, being the house and lot numbered ninety-eight (98), on Madison street, Memphis, Tennessee, to be held and used by her, with all the income to be derived therefrom, during her

71 natural life, but upon condition that she renounce all claim upon my estate for moneys accruing from the sale of a tract of land in Illinois conveyed to me in trust for her benefit by Dr. W. N. Mercer, a considerable portion of which monies were lost by depreciation during the late war and the balance paid over to the late Walter Goodman, then her trusted friend and agent, to be invested for her benefit in Mississippi. At her decease or upon her declining the conditions as above, then my will is that said property be sold for the benefit of the daughters then surviving of my several daughters.

Second. I will and bequeath to my daughter, Maria Elizabeth Strange, and to — heirs and assigns forever, without the con-
72 trol of her husband, should she marry again, the house and — numbered fifty-nine (59), on Madison street, in Memphis, Tennessee, being the same as formerly occupied by me as my family residence; also all my personal property of every kind and description, to be taken possession of by her at my decease without inventory or appraisement.

Third. I will and bequeath to my said daughter, Maria E. Strange, in trust, one thousand dollars each for the benefit of the several daughters of my daughters, Sarah and Eugenia, deceased, surviving me, namely, Alice Moore and Fannie Mitchell and Leddie Eugenia Crighton, and one hundred dollars for the benefit of my grandson, Wm. B. Mitchell, Jr., should he survive me, to be employed
73 and invested at the direction of the said Maria E. Strange.

Fourth. All other property may be sold for the benefit of my own children equally who may survive me.

Fifth. I appoint my daughter, Maria Elizabeth Strange, to be sole executrix of this my last will and testament, without any security to be required of her for the faithful performance of her duties as such, and I request that she will give the watch presented me by Dr. Mercer to my son Mercer, my own watch to Ayres A. Strange, my mosaic casket to Lazie Strange, and my signet ring to Alice Moore Mitchell.

In witness whereof I have hereunto set my hand and seal, in
74 the city of New York, this twenty-second day of June, eighteen hundred and seventy-one.

(Signed) A. P. MERRILL. [SEAL.]

Signed, sealed, published, and declared to be his last will & testament by the aforesaid Ayres Phillips Merrill in presence of us, the undersigned, who, in his presence, at his request, and in the presence of one another, subscribed our names as witnesses the day and year above written and in the said city of New York.

(Signed) HENRY TALMADGE.
HENRY P. TALMADGE.
J. TALMADGE.

Exhibit D.

A. P. Merrill to Maria E. Strange.

This indenture, made the third day of December, in the year one thousand eight hundred and sixty-seven, between Ayres
75 Phillips Merrill, of the first part, and Maria Elizabeth Strange, both of New York city, of the second part, witnesseth: That the said party of the first part, for and in consideration of the love he bears his said daughter, and the sum of ten dollars lawful money of the United States to him in hand p-id by the said party of the second part at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged and the said party of the second part, her heirs, executors, and administrators, forever released and discharged from the same by these presents, has granted, bargained, sold, aliened, remised, released, conveyed, & confirmed and by these presents doth grant, bargain, sell, alien, remise,
76 release, convey and confirm unto the said party of the second — and to her heirs and assigns forever all that lot or parcel of land situate and being in the city of Memphis, Shelby county, Tennessee, being parts of the original lots known as lots number- three hundred and fifty-five and three hundred and fifty-six (355 and 356), beginning at the south side of Madison street, at the point where the alley between Second and Third streets intersect Madison street, and thence west with the southern boundary of Madison street thirty-five feet (35 feet) to a stake; thence south across the east end of said lots number- 355 and 356 one hundred and forty-eight feet six inches to the alley between Madison and Monroe streets; thence east
77 with the north line of said alley thirty-five feet (35 feet) to the point where the said last-named alley intersects the alley between Second and Third streets; thence north with the west line of the last-named alley parallel with Second street one hundred and forty-eight feet six inches (148 feet 6 inches) to the place of beginning; said lots hereby conveyed being thirty-five feet by one hundred and forty-eight feet six inches, which includes the east end of the lot-numbers 355 and 356, and being the same property conveyed to me by David Looney on the second day of May, in the year one thousand eight hundred and fifty-one (A. D. 1851), by deed recorded in book number seven, pages 375 & 376 and 377, records of the county of
78 Shelby, Tennessee, together with all and singular the tenements, heriditaments, and appurtenances hereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatever, as well in law as in equity, of the said party of the first part of, in, and to the same and every part and parcel thereof, with the appurtenances; to have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to her and their own proper use, benefit, and behoof forever; and the said

79 Ayres Phillips Merrill, party of the first part, for himself, his heirs, executors, and administrators, does covenant, grant, and agree to and with the said party of the second part, her heirs and assigns, that the said Merrill, at the time of the sealing and delivering of these presents, is lawfully seized in — of a good, absolute, and indefeasable estate of inheritance in fee simple of and in all — singular the above granted and described premises, with the appurtenances, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner aforesaid, and that the said party of the second part, her heirs and assigns, shall and may be at all times hereafter peaceably and quietly have,
80 hold, use, occupy, possess, and enjoy the above-granted premises and every part and parcel thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, his heirs or assignes, or of any other persons or persons lawfully claiming or to claim the same, and that the same now are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and encumbrances of what nature or kind soever; and also that the said party of the first part and his heirs and all and every person or persons whomsoever lawfully or equitably deriving any estate, right, title or interest of, in, or to the hereinbefore granted premises by, from, under,
81 or in trust for him and them shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, her heirs and assignes, make, do, and execute, or cause to be made, done, and executed, all and every such further and other lawful and reasonable act, conveyances, and assurances in the law for the better and more effectually vesting and confirming the premises to the said party of the second part, her heirs and assigns, forever, as by the said party of the second part, her heirs or assignes, or her and their counsel learned in the law shall be reasonably advised or required.

82 And the said Ayres Phillips Merrill, his heirs, the above-described and hereby granted and released premises and every part and parcel thereof, with the appurtenances, unto the said party of the second part, her heirs and assigns, against the said party of the first part and his heirs and against all and every person and persons whomsoever lawfully claiming or to claim the same shall and will warrant and by these presents forever defend.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

A. P. MERRILL. [SEAL.]

Sealed and delivered in the presence of—
THO. SADLER.
JOHN E. POST.

83 STATE OF NEW YORK, } ss:
City and County of New York, }

By this public instrument be it remembered that on this thirteenth day of December, A. D. one thousand eight hundred and sixty-seven, before me, the subscriber, Thos. Sadler, a commissioner in and for the State of New York, appointed *appointed* by the Governor of the State of Tennessee to take proof and acknowledgment of deeds, mortgages, letters of attorney, or any other instrument to be used or recorded in the said State of Tennessee, personally appeared Ayres Phillips Merril, whose name is signed to the annexed instrument, bearing date December 3d, A. D. 1867, and who is per-
84 sonally well known to me, — acknowledged before me on this day that, being informed of the contents of the said instrument, he executed the same voluntarily as his free act and deed and delivered the same to be certified.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[SEAL.] THO. SADLER,
Commissioner for Tennessee, No. 11 *Wall Street, New York.*

STATE OF TENNESSEE, *Shelby County:*

The foregoing instrument, with commissioner's certificate, was filed in my office for registration on the 27th day of December,
85 1873, at 8.53 o'clock a. m., and noted in note book No. 8, page 33, and was recorded *in* the 27th day of December, 1873.

JOHN BROWN, *Register,*
By J. C. BUSTER, *D. R.*

STATE OF TENNESSEE, *Shelby County:*

I, H. W. Gribel, register in and for said county and State, certify that the above pages contain a full, true, and perfect copy of a deed from A. P. Merrill to Maria E. Strange as the same appears of record in my office in record book No. 98, pages 170, 171, 172, and 173.

Witness my hand and seal this January 14th, A. D. 1875.

H. W. GRIBEL, *Register.*

Answer to 2d Amended Complaint.

86 The Supreme Court, City and County of New York.

ANNA MERCER CARPENTER
against
MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayers P. Merrill, Deceased, and WILLIAM NEWTON MERCER MERRILL.

The defendant, Maria E. Strange, above named, for answer to the second amended complaint of the plaintiff above named in this action, —:

1st. I admit that the said Ayres P. Merrill mentioned in the complaint died in the month of November, 1873, leaving a last will and

testament, a copy of which is annexed to the said amended
87 complaint; that the said last will and testament was admitted to probate (the plaintiff herein contesting the same and objecting to such admission) by the surrogate of the county of New York as a will of real and personal estate in the month of February, 1874; that this defendant is the executrix named in said will; that letters testamentary thereon were duly granted and issued unto this defendant, as the executrix of said will, by the said —; that this defendant is and has been duly qualified as such executrix; that the plaintiff and this defendant are the daughters of the said testator; that in the year 1863 the plaintiff became a widow by the death of her husband, Samuel Carpenter; that all the
88 personal property of the said testator was by his said will bequeathed to this defendant; that by said will apparently one certain piece of real estate was devised by the testator to this defendant in fee, but in fact the said piece of real estate was conveyed to this defendant by said testator previous to his death, and this defendant took said real estate by such conveyance; that another piece of real estate, situated in the city of Memphis, in the State of Tennessee, was devised by the said testator by his said will to this defendant in trust, as will appear by said will, reference thereto being made; that the said testator in and by said will devised to plaintiff the real estate on that behalf described
89 in the said amended complaint upon the condition in the said amended complaint set forth; that the plaintiff has not renounced any claim by her made, to this defendant's knowledge, against the testator since his death; that the testator at the time of his death was free from all debts and liabilities, except a few of trifling amount for current expenses immediately prior to his death and except also certain debts and liabilities for taxes and assessments, which were liens on that part of the real estate mentioned in the said amended complaint situated in said city of Memphis, in the State of Tennessee, whereof he died seized; that this defendant does deny the liability of the testator's estate for and does
90 now refuse to treat said sums on that behalf mentioned in said amended complaint or either of them as valid or subsisting claims against the testator's estate or to pay the same or any of them or any part thereof; that all debts which at that time or at any time existed against the testator's estate have been paid except the aforesaid taxes and assessments upon the real estate whereof the testator died seized.

II. For a first defence denies that that part or portion of the last will and testament by the testator which is quoted on the second page, at folios 3 and 4, of said amended complaint or that any part of said last will and testament was or is wholly or to any ex-
91 tent or in any part untrue, or that the same or any part thereof was put into said will for wrong or corrupt purposes, or that on the 3d day of April, 1857, or at any other time the said Dr. William Newton Mercer, in consideration of love and affection for the plaintiff or in consideration of the fact that the said plaintiff was named for the wife of the said Dr. William Newton Mercer or

for any other consideration, conveyed by deed to said Ayres P. Merrill in trust for the plaintiff, as in the said amended complaint stated, or conveyed in any other way or for any purpose, except as hereinafter stated, the said tract of land on that behalf in said amended complaint, on folio 5 thereof, mentioned, or that said
92 tract of land was by said deed conveyed to said Ayres P. Merrill aforesaid in trust for the sole and separate use of and benefit of the plaintiff, or that said testator, the alleged trustee, in breach of the trust alleged in the said amended complaint or otherwise, converted the money mentioned in said amended complaint or any part thereof to his own use, or that the same or any part thereof became absorbed in his business or materially enhanced or at all enhanced the value of his estate, or that the same or any part thereof was in any way used by the said testator in his lifetime, or that the plaintiff, as an affectionate daughter in distress or otherwise,
93 looked to her father, the said testator, as her natural advisor or as one to whom — owed infinite or any obedience, or that she reposed and unquestioned trust or any trust whatever in him, or that the plaintiff was or is in utter ignorance or at all ignorant of what the said Ayres P. Merrill has done with the monies mentioned in the said amended complaint as part of the alleged trust estate, or that the said testator left by said will a large real estate of any other or greater value than the value hereinafter on that behalf in the said amended complaint stated in the city of Memphis and State of Tennessee or elsewhere, or that the same is or is believed to be by any other person other than plaintiff, to this defendant's knowledge, worth from
94 seventy-five thousand to one hundred and twenty-five thousand dollars or any greater sum than is hereinafter on that behalf stated, or that by said will the said testator left to any person a large sum of money or a large amount of personal property in the city of New York or elsewhere or any money or personal property except as hereinafter stated, or that the entire estate left by the testator, exclusive of real estate and exclusive of the claim hereinafter alleged against the plaintiff, exceeded or exceeds the sum of six hundred dollars in value, or that any part of the real estate of which the testator died seized was left to this defendant by said will
95 except that one house and lot situated in the city of Memphis, Tennessee, was by said will devised to this defendant in trust under and by virtue of the fourth clause of said will to be sold for the benefit of the children of the testator equally who might survive him, as by reference to said will when the same shall be produced on the trial will more fully and at large appear, or that the plaintiff at any time during the lifetime of the testator loaned to him or placed in his hands in trust for her large or any sums of money whatever amounting to the sum of four thousand dollars or any other sum, which denial this defendant makes upon her information and belief, and upon like information and belief denies that
96 any sum or sums of money at any time loaned or advanced to or placed in the hands of the testator by plaintiff was or were invested in whole or in part in the real estate or any part thereof owned at any time by the testator or of which he died seized or went to

make up said estate; and further denies that any sum of money at any time due or owing by the testator to the plaintiff was left or remained due, owing, or unpaid by the testator to plaintiff at the time of his decease, or that the allegations in the said amended complaint contained at folios 25, 26, and 27 thereof, from and including the word "and," commencing the clause at the end of the 25 folio, to and including the word "value," concluding the same clause
97 in the 27th folio thereof, are true, or that any of them or any part or portion of them or either of them is true, or that said life estate mentioned in said amended complaint and devised by the will of the testator to plaintiff, is of little or insignificant value, or that this defendant is by the death of the said Ayres P. Merrill or by the said will or otherwise made or become the sucessor of the said Ayres P. Merrill as trustee of the said alleged trust funds or estate mentioned on that behalf in said amended complaint, or of any trust fund or trust estate in which the plaintiff is interested as *cestui que trust*, or that this defendant is unfit for the position of trustee of said trust, did any such trust exist,
98 and this defendant succeed to it, or that the interest of this defendant is opposed to the interest of the plaintiff by operation of said will or otherwise; and this defendant denies that she has any knowledge or information sufficient to form a belief whether or not at the time of the death of the testator there was any claim existing in favor of the plaintiff against or debt or balance due or unpaid William Newton Mercer Merrill from the testator or any liability existing from or on his part to them or either of them for any sum of money loaned, advanced, or put into the testator's hand in trust by them or by any other person or held by him in
99 trust for them for any purpose or use at any time, or whether or not since the death of the testator there has been or is any such claim or claims, debt or debts, or balance as is alleged in the said amended complaint or any other debt or balance existing or due or owing to or in favor of the plaintiff or in favor of said William Newton Mercer Merrill or either of them against this defendant individually or as executrix of the last will and testament of Ayres P. Merrill, deceased, or against the estate of the said testator; and this defendant denies each and every allegation in the said amended complaint contained, stated, and set forth therein in the 30th, 31st, 32d, 33rd, and 34th folio thereof, from and after
100 the words "and this plaintiff further alleges," in the 30th folio, to and after the word "said," next preceding the prayer of the said amended complaint, on the 34th folio thereof, and every part and particular thereof; and this defendant further denies that she has any knowledge or information sufficient to form a belief whether or not this defendant's testator duly or otherwise recorded the deed mentioned in folio 6 of said amended complaint or whether or not this defendant's testator, as trustee or otherwise, took possession of said three hundred and twenty (320) acres of land mentioned in the said amended complaint or held the same by virtue of any deed of trust for the benefit of the plaintiffs or whether or not
101 the said tract of land was sold or conveyed by this defend-

ant's testator, as stated in the said amended complaint, for or that this defendant's testator received as consideration therefor the sum or sums of money on that behalf set forth in the amended complaint in cash or in satisfaction or payment of mortgages or otherwise or received or had any interest on said mortgages or on any sum alleged to have been secured by or mentioned in said mortgages alleged in the said amended complaint.

III. And for a further separate and second defence this defendant alleges—

That the cause and causes of action stated in the said amended complaint did not nor did any or either of them accrue
102 within six years before the commencement of this action.

2d. And for a further separate and third defence this defendant alleges that the cause and causes of action stated in the said amended complaint did not nor did any or either of them accrue within ten years before the commencement of this action.

5th. And, for a further, separate, and fourth defence, this defendant denies that she has any knowledge or information sufficient to form a belief whether the allegations contained in the said amended complaint in respect or in relation to the alleged making, execution, and delivery by said Dr. William Newton Mercer to the testator in his lifetime of a deed of trust or conveyance in trust, the time
103 of the alleged delivery thereof, the alleged contents thereof, the provisions alleged to have been contained therein, the purpose thereof, the disposition of the lands alleged to have been conveyed thereby, the holding, sale, conveyance, or disposition of said lands by the said testator, the receipts on the alleged sale of the said lands by the testator of the alleged price or consideration therefor, the alleged mortgages or the alleged payment thereof, or the release of said lands from the said alleged mortgages by the testator, are or whether any of them are true, or whether any statement in the said amended complaint contained in any way touching upon or relating to the same, contained at folios 5, 15, 19 of said amended
104 complaint, are, or whether any of them is, either in whole or in part, true or otherwise, except as hereinbefore or hereinafter denied or alleged, or whether the alleged copies of the alleged deeds, documents, instruments, or records annexed to the said amended complaint other than the copies of the said will and the copy of the said deed by the testator to this defendant in her individual capacity are or whether any of them are true or correct copies, in whole or in part, of said or any alleged original deeds, documents, instruments, writings, or records, or whether or not any such deeds, conveyances, documents, instruments, writings, or records exist, except as hereinbefore admitted or hereinafter alleged.

105 6. And, for a further, separate, and fifth defense, this defendant alleges, upon her information and belief, that at or about the third day of April, A. D. 1857, the said William Newton Mercer, by a certain deed or instrument or conveyance, bearing date on that day, of which the exhibit annexed to the said amended complaint and marked Exhibit "A" is a copy, as this defendant believes, granted, bargained, sold, and conveyed to Ayres P. Merrill,

this defendant's testator, his heirs and assigns, all that certain tract of land situate, lying, and being in the county of Macoupin and State of Illinois known and designated as follows, to wit: The north half of section (9) nine, township eight (8) north,
106 range eight (8) west, of the third principal meridian, except that part of said half section theretofore deeded to or owned by the Chicago, Alton and St. Louis Railroad Company; to have and to hold the said tract or parcel of land, together with all and singular the privileges and appurtenances thereunto belonging or in anywise appertaining, to the only proper use and benefit of the said Ayres P. Merrill, this defendant's testator, the grantee therein named, his heirs and assigns, forever; and the said William Newton Mercer, the grantor in said deed or instrument of conveyance named, did therein and thereby, for himself, his heirs, executors, and administrators, covenant with said Ayres P. Merrill that the said grantor was
107 lawfully seized, and had full right to convey, and would forever warrant and defend, the said tract of land from the claim of him, said grantor, his heirs and assigns, and against the claim or claims of any other person whomsoever claiming by, through, or under him, said grantor, but against no other claims whatever; by which said deed or instrument of conveyance said tract of land and appurtenances was conveyed to and became vested in said Ayres P. Merrill, this defendant's testator, in fee simple absolute; that the said tract of land so conveyed to and vested in this defendant's testator is the same tract of land mentioned in the said amended complaint, at folio- 5 to 13, inclusive, and therein alleged to
108 have been conveyed in trust to this defendant's testator and afterwards by him sold and conveyed to other parties; and this defendant, upon her information and belief, further alleges that said deed or instrument of conveyance made by said William Newton Mercer to this defendant's testator, alleged in said amended complaint, did not constitute or establish a trust, and that no trust was thereby created in said tract of land and appurtenances in favor of the plaintiff, and that the plaintiff by said deed or instrument of conveyance did not take, and that there never was thereby vested in the plaintiff, and the plaintiff never had any right, title, or
109 interest in or to said tract of land thereby conveyed, either as *cestui que trust* or otherwise, and that the plaintiff had not, at the time of commencement of this action or at any other time, any right, title, or interest in or to the said alleged proceeds of said alleged sale by this defendant's testator of said tract of land and appurtenances, or any right to call this defendant's testator or this defendant to an account for said alleged proceeds or the disposition thereof under and by virtue of said deed or instrument of conveyance or otherwise.

And this defendant further alleges, upon her information and belief, that about or shortly subsequent to the time of the said
110 alleged sale of said tract of land and appurtenances by this defendant's testator, he, this defendant's testator, for and at the request of the plaintiff and for her benefit, paid over unto the plaintiff or to one Walter Goodman, with whom the plaintiff then

resided, of the proceeds of said alleged sale of said tract of land the sum of four thousand two hundred and twenty-seven dollars ($4,227.00) for the purpose of investing the same in the purchase of cotton for the plaintiff's benefit, and that the said last-mentioned sum of money was thereafter, by the consent or direction of the plaintiff, so invested in the purchase of cotton; that thereafter the said cotton so purchased for plaintiff's benefit with the afore-
111 said money was destroyed by fire, and the same and said sum of money invested in the purchase thereof as aforesaid became and was wholly lost without any negligence or fault on the part of this defendant's testator; and this defendant further alleges, on her information and belief, that the said Walter Goodman thereafter paid over to the plaintiff a sum of money on account of said money so invested and lost as aforesaid and to reimburse the plaintiff for said loss in said investment, the amount whereof is unknown to the defendant; and this defendant further alleges, on her information and belief, that thereafter and during the lifetime of defendant's testator he, defendant's testator, of his own money invested for the use
112 and benefit and at the request of the plaintiff the sum of two thousand two hundred and ten dollars ($2,210.00) in the purchase of United States bonds, commonly known as and called 5.20 bonds, of a value of two thousand two hundred and ten dollars and upwards, and that thereafter this defendant's testator paid the interest and income accruing on or from said bonds as the same accrued from time to time and as the same was collected over unto the plaintiff, and that at some time during the year 1871 the said bonds, then amounting in value to the sum of $2,210 and upwards, were by this defendant's testator, at the request of the plaintiff, transferred and delivered absolutely to the plaintiff, who thereafter sold and converted the same to her own use, and that said bonds
113 have not nor *had* any of them or any part of the moneys arising from the sale and conversion thereof by plaintiff been paid back or transferred to this defendant's testator in his lifetime or to this defendant since his decease; and this defendant further alleges, on her information and belief, that said Ayres P. Merrill, this defendant's testator, on or about the twenty-second day of June, 1871, having in view the aforesaid loss to plaintiffs of moneys upon the aforesaid investment for her benefit in the purchase of cotton, and desiring to make proper and equitable provision for the support and maint*a*inance of the plaintiff, made his last will and testament, wherein and whereby he devised unto
114 the plaintiff for her life a certain house and lot of land situated in the city of Memphis, in the State of Tennessee, and known as and by the number 98 Madison St., in said city, upon the condition annexed, that the plaintiff would renounce all claim against the estate of this defen lant's testator for or on account of the said alleged tract of land, the proceeds thereof, the said alleged trust estate and fund, as by said will, when produced at the trial hereof, will more fully and at large appear; that, although by reason of the unsettled condition of financial affairs in said city of Memphis, no sale could now be made of said house and

lot devised as aforesaid to the plaintiff for an adequate con-
115 sideration, or without a great sacrifice and a great reduction from the real value thereof, nevertheless the real and actual value thereof at the time of the death of this defendant's testator was and now is about the sum of fifteen thousand dollars, and greatly exceeds in value the alleged trust fund or estate, and that the yearly rental value thereof is about the sum of twelve hundred dollars; that any two pieces of real estate were divided by said will of this defendant's testator; that one of the pieces named in said will, known as the homestead or family residence and by the number 59 Madison street, Memphis, Tennessee, therein described and apparently thereby devised to the defendant, having
116 been in the lifetime of this defendant's testator conveyed by deed of the testator to this defendant, and that the said two pieces of real estate devised by this defendant's testator by his said will, including the piece of real estate devised to plaintiff for her life, are, respectively, houses and lots, and are of the value in the aggregate of at least thirty thousand dollars, and are entirely unencumbered, except by taxes and assessments levied thereon before and since the death of the testator; that said testator left no personal estate at his death except a small sum of money, less than $450.00 in amount, which has been expended by this defendant in the payment of the funeral expenses of the testator, except a
117 small part thereof loaned to plaintiff and certain personal property and bills receivable, amounting in value, except and over and above the herinafter-mentioned claims against the plaintiff, amounting to the sum of $2,210, to not more than one hundred and fifty dollars, as this defendant has been informed and alleges upon her information and belief.

And this defendant further alleges, upon her information and belief, that all the real estate owned by this defendant's testator in his lifetime, in the city of Memphis, in the State of Tennessee, and elsewhere was purchased and paid for by him long prior to the year 1855, and that all the improvements thereof and additions thereto were made and paid for by him long prior to the con-
118 veyance to him made by said William Newton Mercer by the deed or instrument of conveyance, a copy whereof is annexed to the amended complaint, marked Exhibit A, and that no part of the proceeds arising from the sale by this defendant's testator of the tract of land by said deed conveyed was expended upon the real estate of the testator, either in the purchase or improvement thereof or in making additions thereto or otherwise; and this defendant further alleges, upon her information and belief, that this defendant's testator was not at any time since the above-mentioned conveyance of William Newton Mercer to him engaged in any business whatever other than the practice of medicine, his profession
119 being that of a physician, and during all the business portion of his life he was engaged in practice in his profession; and this defendant further alleges, upon her information and belief, that the plaintiff has not, independent of the terms and conditions of the last will and testament of Ayres P. Merrill, deceased, any right to, title or

estate in, the said real estate and premises so as aforesaid devised by said will, and the said devise in and by said will is and ought to be taken and accepted by plaintiff as a complete satisfaction of all her claims, out of whatsoever matter or thing the same may have grown, against the estate of this defendant's testator; and there does
120 not exist, either in law or equity, any obstacle to the renouncing by plaintiff of all her claims and demands against the estate of said testator, or the acceptance by plaintiff of the said devise to her by said will upon the terms and conditions thereby imposed.

7. And, for a further, separate, and sixth defense, this defendant alleges that on the third day of December, 1867, and at the time of the execution and delivery of the deed of conveyance from the testator to this defendant in her individual capacity mentioned and set forth in the amended complaint herein, the said Ayres P. Merrill was solvent and able to pay, satisfy, and discharge all his just debts and liabilities of whatever character or by whomsoever held
121 or preferred, and thereafter at all times was and remained at the time of his death in like condition of solvency and ability, above, outside, and independent of the house and lot of land by the aforesaid deed of conveyance by him conveyed to this defendant in her individual capacity.

8. And, for a further, separate, and seventh defense, this defendant alleges—

That the plaintiff did not before the commencement of this action present her claim or demand or any part of it against the estate of the testator to this defendant in her representative capacity as executrix aforesaid, or ask or demand of this defendant, as executrix or otherwise, that her said claims or demands or any part thereof
122 should be allowed by this defendant against the estate of the testator, or obtain a rejection of her said claims or demands involved in this action or any part of them before bringing this action.

9. And, for a further, separate, and eighth defence and by way of counter-claim, this defendant, upon her information and belief, alleges that heretofore and *on* or about the year 1866 this defendant's testator, for and at the request of the plaintiff, paid, laid out, and expended for the benefit of the plaintiff the sum of $2,210.00 in money for and in the purchase for the plaintiff of bonds of the United States of America, commonly known as and called United
123 States 5.20 bonds, and that thereafter and in or about the year 1871, at the request of the plaintiff and for her benefit, the said testator transferred and set over to the plaintiff said bonds, which were then of the value of said sum of $2,210.00, and the plaintiff thereupon sold and converted the said bonds to her own use; that the plaintiff, upon the transfer of said bonds to her, undertook and promised to pay unto this defendant's testator the value thereof, amounting to the sum of $2,210, but did not pay said sum of money to defendant's testator, and has not since his death paid the same to the defendant as the executrix of his last will and testament, and said sum now remains justly due and owing from the plain-
124 tiff to this defendant as the executrix of the last will and tes-

tament of said Ayres P. Merrill, deceased, with interest thereon from January 1, 1872; and this defendant further alleges that between the first day of August, 1859, and the first day of September, 1866, this defendant's testator paid, laid out, and expended for taxes and divers other current necessary expenses on said tract of land situated in Macoupin county, in the State of Illinois, the sum of, in the aggregate, *of* $804.31, which sum, in case it be found that said testator or his estate should be charged with said land as a trust estate or with the proceeds of the sale thereof as a trust fund or estate, ought to be offset against any sum of money on account of said alleged trust fund which may be found due the plaintiffs herein.

125 10. And, for a further, separate, and ninth defence, this defendant denies each and every allegation in the said amended complaint contained and every part and particular thereof not hereinbefore specifically admitted or denied or controverted, upon her information and belief, by way of denial or allegation.

Wherefore this defendant prays that the said amended complaint herein may be hence dismissed as to her individually or in her individual capacity as well as to her in her representative capacity as the executrix of the last will and testament of Ayres P. Merrill, deceased, and that this defendant in her capacity of executrix of the last will and testament of Ayres P. Merrill, deceased, *ad re-*
126 cover of the plaintiff herein the sum of two thousand and two hundred and ten dollars upon this defendant's counterclaim herein, with interest thereon from the first day of January, 1872, besides the costs of this action; that the terms, devises, and provisions contained in the last will and testament of Ayres P. Merrill, deceased, and each and every of them, so far as the same relate to or provide for the plaintiff, may be adjudged and declared to be lawful and equitable and be in all things sustained and permitted to stand as made, and that it may be adjudged and declared by this court herein that the devise to and the provisions made for the plaintiff by said last will and testament was and is, as it
127 was intended by said testator to be, in full satisfaction of any and all claims and demands which the plaintiff had against him at the time of the death of the testator or now has against his estate or against this defendant in her capacity of executrix of his last will and testament; that in the event that the plaintiff shall elect to take or in the event that it shall be adjudged that plaintiff take and accept the devise contained in said last will and testament so intended to be in satisfaction of all her claims and demands against the estate of said testator that the principal in that case be required and directed by the judgment of this court to execute and deliver to this defendant, in her representative capacity as
128 the executrix of said last will and testament and also to this defendant in her individual capacity, a release in due form of law of this defendant and the estate of said testator from all her claims and demands, as in said last will and testament provided, as to the testator's estate; and that in event that plaintiff shall not elect to take or accept nor be required to take or accept the devise

to and provisions for her contained in said last will and testament, and it be found that the plaintiff is entitled to an accounting as to said alleged trust estate as found and to recover any amount for or on account thereof, this defendant prays that in such case the hereinbefore-mentioned sum of $2,210.00 set up by way of counter-claim and defence, together with interest thereon as aforesaid, and also said sum of $804.31 set up herein by way of offset to plaintiff's claim, together with interest thereon from January 1st, 1867, may be offset against such recovery, and that this defendant may have such other or further relief or judgment against the unjust claims and demands of the plaintiff herein as to the court shall seem meet.

H. E. FARNSWORTH,
Att'y for the Defendant, Maria E. Strange.

CITY AND COUNTY OF NEW YORK, *To wit:*

Maria E. Strange, being duly sworn, doth depose and say that she is one of the defendants above named in this action; that the foregoing answer is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters she believes it to be true.

Sworn to before me this 13th day of November, 1878.

Answer of W. N. Merrill. May 17, 1878.

New York Supreme Court, County of New York.

ANNA MERCER CARPENTER
against.
MARIA E. STRANGE, Executrix, &c., and WILLIAM N. M. MERRILL.

The above-named William Newton Mercer Merrill, one of the defendants in this action, answering the plaintiff's complaint in this action, by Ruggles & Baldwin, his attorneys, says:

1st. He admits, on information and belief, that Ayres P. Merrill's will was probated as mentioned in said complaint, and that he died as therein mentioned; also that Dr. William Newton Mercer conveyed in trust to s'd Ayres P. Merrill, *on* or about 1857, the real estate mentioned in said complaint and for the purposes therein mentioned; also that the said Ayres P. Merrill sold and conveyed the s'd real estate as mentioned in said complaint; also that the proceeds of the sales of said real estate were, as alleged in said complaint, converted by the said Ayres P. Merrill to his own use in breach of said trust, and that he renderd to plaintiff no account of his said trust.

And that he died possessed of the real estate mentioned in said complaint, claiming the same in fee.

And that the plaintiff loaned four thousand dollars to said Ayres P. Merrill, as mentioned in the complaint, but how the same was invested by him, if at all invested, this defendant has not any knowledge, and therefore he neither admits or denies the allegation in that regard contained in the complaint herein, and leaves the plaintiff to make such proof thereof as she may be advised.

And that the deed mentioned in said complaint as made by Ayres P. Merrill to the defendant, Maria E. Strange, was obtained
133 without any valuable consideration in law therefor, and if obtained at all from said Ayres P. Merrill was so obtained in fraud of plaintiff and by collusion.

Further answering, this defendant says that he is informed and believes it to be true and therefore admits that all the other matters mentioned in such complaint and not hereinbefore specifically answered unto are true as alleged in said complaint.

RUGGLES & BALDWIN,
Att'ys for Def't Merrill.

STATE OF NEW YORK, *County & City of N. Y.:*

James M. Baldwin, being duly sworn, says that this answer is not verified by the defendant, William N. M. Merrill, because he is now absent from the State of New York.

134 That deponent's knowledge of the matters mentioned in the foregoing answer is derived entirely from said last above-named defendant and from documents by him shown to deponent; that deponent has read the said answer and knows its contents, and that the same is true, of his own knowledge, except as to those matters which are therein alleged to be stated upon information and belief, and as to those matters he believes it to be true; and deponent also says that he is one of the said W. N. M. Merrill's attorneys herein.

JAMES M. BALDWIN.

Sworn to May 17, 1878, before me—
COTTRELL J. CAHALEY,
Notary Public, Kings Co.

135 (Certificate filed in N. Y. Co.)

Replication of A. M. Carpenter.

Supreme Court, City & County New York.

ANNA MERCER CARPENTER

against

MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayres P. Merrill, Dec'd, & WILLIAM NEWTON MERCER MERRILL.

The replication of Anna Mercer Carpenter, above-named plaintiff, to the several amended answer of Maria E. Strange, executrix of the last will and testament of Ayres P. Merrill, deceased, one of the above-named defendants.

136 The above-named plaintiff, Anna Mercer Carpenter, replying to the several amended answer of the above-named defendants, Maria E. Strange, executrix of the last will and testament of Ayres P. Merrill, deceased, says—

First. That she, this plaintiff, denies each and every allegation contained in the said several answer of the said defendant, Maria E. Strange, executrix of the last will and testament of Ayres P. Merrill, and all new matter set up in the amended answer of the said defendant.

Second. And this plaintiff, further replying, denies that shortly subsequent to the time of the alleged sale of the tracts of land conveyed by the deed of trust, a copy of which is annexed to
137 this plaintiff's complaint herein, by the said defendant's testator or at any time the said defendant's testator for and at the request of this plaintiff or for her benefit, paid over to this plaintiff or to one Walter Goodman four thousand two hundred and twenty-seven ($4,227) dollars or any other sum of the proceeds of the sales of said tracts of land at her, the said plaintiff's, request or for her benefit; and this plaintiff denies that said Walter Goodman was ever at any time this plaintiff's agent or had any power or authority from her to receive from said defendant's testator any sum of money for or on account of this or on account of said trust estate whatever; and this plaintiff, further replying, denies that
138 said Walter Goodman thereafter or at any time paid over to this plaintiff any sum or sums of money whatever for or on account of moneys received by him from the defendant's testator or for or on account of the said trust estate in the plaintiff's complaint herein set forth, or that said Walter Goodman ever had any authority to receive any such sum or sums of money for or on account of this plaintiff.

Third. And this plaintiff, further replying, denies that the said defendant's testator of his own money (or from the money arising from said trust estate) invested for the use and benefit of this plaintiff or at her request the sum of $2,210, two thousand
139 two hundred and ten dollars, or any other sum in the purchase of United States bonds, commonly called or known as

(5.20) five-twenties, or any other bonds whatever, but the plaintiff alleges that during the lifetime of said defendant's testator and prior to the year 1871 this plaintiff at divers times and on dif-erent occasions loaned and advanced to the said defendant's testator large sums of money, *containing* in the aggregate to about the sum of $4,000, four thousand dollar-, and that the monies so loaned and advanced by this plaintiff to said defendant's testator at all times during the lifetime of said defendant's testator constituted a
140 a legal, subsisting, and valid debt or demand against said defendant's testator to the amount of about said sum of $4,000, four thousand dollars, and if at any time the plaintiff received from the said defendant's testator any sum or sums of money or any security or assets whatever the same were received by this plaintiff on account of and in payment *pro rata* of said legal, subsisting, and valid debt against him, said defendant's testator, and plaintiff denies that she, this plaintiff, at any time promised to pay to the defendant's testator said value thereof to the amount of $2,210, twenty-two hundred and ten dollars, or any other sum what-
141 ever, or ever promised the defendant, as executrix of said Ayres P. Merrill, deceased, to pay her said sum, amounting to $2,210, twenty-two hundred and ten dollars, or any other sum whatever.

Fourth. Plaintiff, further replying, denies that defendant's testator, Ayres P. Merrill, paid the taxes upon the lands conveyed in the deed of trust annexed to plaintiff's complaint herein; but the plaintiff alleges that the taxes on said property and all other expenses of the execution of the trust under said trust deed, a copy of which is annexed to the plaintiff's complaint herein, were paid out of the proceeds of the sales of said lands conveyed by said deeds of trust and the net proceeds of said sales paid over to said defendant's testator.

142 Fifth. This plaintiff, further replying, denies that only two pieces of real estate in Memphis, Tennessee, were devised by the said defendant's testator in his last will and testament, and denies that the testator in his lifetime conveyed by deed to the defendant the piece of land or real estate known in the will as the homestead or family residence and by the number (59) fifty-nine Madison St., Memphis, Tennessee; and plaintiff denies that any deed of said property was ever during the lifetime of said defendant's testator delivered by him, said defendant's testator, to said defendant, but as executrix of the last will and testament of said Ayres P. Merrill, deceased, the said defendant, having proved the
143 said will, claimed to take said homestead as one of the devise-s under said will; and plaintiff denies that said homestead was paid for before 1855, or that the repairs and improvements on said property were made prior to the year 1868. Plaintiff, further replying, denies that her action herein was prematurely b-ought, and alleges that due demand for the settlement of said trust estate under said deed of trust, a copy of which is annexed to the plaintiff's complaint herein, and for the payment to this plaintiff of the interest due thereon, and investment of the principal sum in trust under the

terms of said deed of trust was made upon the said defend-
144 ant and the same refused by her before the action herein, and the said defendant, from the time of the death of said testator, has insisted and reiterated the same to he- acquaintances and to this plaintiff that she, the defendant, would make no settlem't or arrangement with this plaintiff about said trust estate except to execute the will of said defendant's testator upon this plaintiff releasing her claim against said estate for said trust moneys due her, this plaintiff.

Sixth. The plaintiff, further replying, denies that the said defendant loaned to this plaintiff any sum or sums of money after the death of said testator, and denies that at the death of said testator the plaintiff was indebted to him, said defendant's testator,
145 for any sum or sums of money whatever, and denies that this plaintiff ever promised to pay to the defendant any sum or sums of money whatever.

Seventh. This plaintiff, further replying, denies that the said defendant's testator was solvent in the year 1867 or at any time afterwards, and alleges that in 1867 and from thenceforward during his lifetime the pecuniary condition of said defendant's testator was such as to require all his personal estate and avails of all his real estate, if fairly and honestly sold, to pay his debts and discharge his obligations under the deed of trust, a copy of which is annexed to plaintiff's complaint, and his obligations to his son, William New-
146 ton Mercer Merrill, under the deed of trust referred to in said complaint.

GEORGE NORRIS,
Plaintiff's Attorney.

STATE OF NEW YORK,
City & County of N. Y., } ss:

Anna Mercer Carpenter, being sworn, doth depose and say that she is plaintiff herein; that she has read the foregoing replication and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to these matters she believes it to be true.

ANNA MERCER CARPENTER.

Sworn to before me this 11 day of December, 1878.
147 JOHN GORMAN,
Notary Public, N. Y. C., No. 54.

Supreme Court, County of New York.

ANNA M. CARPENTER *against* MARIA E. STRANGE.

I, the undersigned, attorney for plaintiff in this action, hereby consent that James M. Baldwin be subst-uted in my place and stead as attorney for said plaintiff.

Dated New York, February 27th, 1879.

GEORGE NORRIS.

Endorsed: Filed Feb'y 28th, 1879.

CITY AND COUNTY OF N. Y., *ss:*

Supreme Court. Special Term. At Chambers, Feb'y 28th, 1879.

148 ANNA MERCER CARPENTER *against* MARIA E. STRANGE.

Present: Hon. Charles Donahou, justice.

On reading and filing the foregoing *lerment* of substitution and on motion of James M. Baldwin it is ordered that he be, and is, substituted in stead and place of George Norris as plaintiff's attorney herein.

Dated New York, Feb'y 28, 1879.

A copy.

HENRY A. GUMBBLEN, *Clerk.*

Order of Reference.

Supreme Court of the State of New York, County of New York. On Special Term Cal'r for January, 1880.

149 ANNA M. CARPENTER *vs.* MARIA E. STRANGE. } No. 79.

Present: Hon. A. R. Lawrence, justice.

This action being on the day calender of this court for trial on January 28th, 1880, and having been duly called in its proper order, and it appearing that the parties hereto desire to refer all the issues herein to Thomas H. Redman, Esqr., as sole referee, to hear and determine and report thereon, now, on motion of James M. Baldwin, of counsel for plaintiff, it is ordered that all such issues be and, they are hereby, referred to the said Thomas H. Redman, Esqr., of the city of New York, counsellor-at-law, as sole referee, to hear
150 and determine all the issues in this action and to report thereon with all convenient speed.

Dated New York, January 29, 1880.

A copy.

(Signed) WM. A. BUTLER, *Cl'k.*

Referee's Report. Thomas H. Redman, Referee.

Supreme Court of the State of New York, County of New York.

ANNA M. CARPENTER

against

MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayres P. Merrill, Dec'd, and WILLIAM NEWTON MERCER MERRILL.

151 I, Thomas H. Redman, the referee in the above-entitled action, to whom was referred all the issues in this action, to hear, determine, and report thereon, and before whom the trial of this action has been, do hereby certify that the amount of plaintiff's recovery herein against the estate of the decedent above named for principle and interest of certain trust funds which came into his hands in or about the year 1867 amounts to the sum of fifteen thousand six hundred eighty-one and $\frac{64}{100}$ dollars, and in my opinion the case is one of those denominated difficult and extraordinary within the meaning and intent of sec. 309 of the code, and I consider that five per cent. of the amount of said recovery would
152 be a fair and reasonable allowance to be made to the plaintiff herein.

THOS. H. REDMAN, *Referee.*

Supreme Court of the State of New York, County of New York.

ANNA M. CARPENTER

against

MARIA E. STRANGE, Ex'r'x, and Another.

STATE OF NEW YORK, *County and City of New York:*

James M. Baldwin, being duly sworn, say- that he is attorney for plaintiff in this action, which was commenced in March, 1878, to recover of the estate of Dr. Ayres P. Merrill, deceased, moneys which he received as trustee for plaintiff during the period
153 intervening — the beginning of the year 1861 and May 1st, 1867, and amounting to sixty-two hundred dollars of principal; that important questions of fact and law were involved, and construction of a certain provision of the last will and testament of said Ayres P. Merrill, and a question of his right to dispose of certain real and personal estate, and also respecting the validity of a deed of conveyance by said Merrill, made to said defendant Strange, purporting to convey real estate situated in Tennessee, and the establishment of a certain conveyance of real estate in Illinois by William W. Mercer to said Dr. Merrill as a deed of trust instead of a conveyance in fee, as claimed by defendant Strange; that neces-

sarily much time and money were expended in the preparation of the pleadings, the drawing of interrogatories, the procuring of exhibits and obtaining abstracts of title, searches for incumbrances in other States, preparing for trial, and trying the action before Thomas H. Redman, Esqr., referee, to whom all the issues were referred, by order of this court and consent of attorneys in January, 1880, after the case had often been called for hearing in special term.

That the case has been, in deponent's judgment, both difficult and extraordinary or distinguished from a common or ordinary case, and involved much that was unusual, and the case required far more than ordinary labor and previous preparation by counsel.

JAMES M. BALDWIN.

Subscribed and sworn to this 2d day of August, 1880.

JNO. D. ATNED,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

STATE OF NEW YORK, *County & City of New York:*

James M. Baldwin, being duly sworn, says that the interest of plaintiff demand that judgment be perfected in the above-mentioned action with the least practicable delay, and for this reason, and also because counsel on both sides desire to shorten the length of notice of motion to the 4th August, 1880.

JAMES M. BALDWIN.

Sworn to this 3d August, 1880, before me.

JOHN P. GAN,
Notary Public, N. Y. Co. (99).

On the foregoing affidavit and referee's certificate, the pleadings, and other proceedings in this action, let the defendants show cause before me, a justice of said court, at chambers thereof, in the court-house, New York city, on the 14th day of August, 1880, at 11 o'clock a. m., or as soon after as counsel can be heard, why the allowance to plaintiff mentioned in the aforesaid certificate of the above-mentioned referee should not be granted or why such other order should not be made as may be just, and service of this order on this day shall be sufficient notice of the motion herein mentioned.

Dated New York, August 3d, 1880, at chambers of the supreme court of New York State.

MILES BEACH, *S. C. J.*

We admit due service of copy of the within certificate and affidavit and admit due service of notice of motion thereon for the 4th

day of August, 1880, at 11 o'clock, at chambers in the court-house, New York city.

New York, Aug. 2d, 1880.

H. E. FARNSWORTH,
Att'y for Def't, Maria E. Strange.
RUGGLES & BALDWIN,
Att'y- for Def't Merrill.

Granted allowance, $250: M. B.

Supreme Court, County of New York.

ANNA M. CARPENTER
against
MARIA E. STRANGE, Ex'r'x, &c.

At chambers, before me, Justice Beach.

158 AUG. 5TH, 1880.

On reading and filing the certificate of the referee and affidavit of plaintiff'- attorney herein, and on motion of said attorney, and on hearing Mr. Farnsworth on opposition on behalf of defendant Srange, it is ordered that plaintiff have an additional allowance herein of two hundred and fifty dollars to be added to the amount of the judgment herein for principal, interest, and costs.

MILES BEACH, *J. S. C.*

Endorsed: Filed Aug. 5th, 1880.

Supreme Court of the State of New York, County of New York.

ANNA MERCER CARPENTER
against

159 MARIA E. STRANGE, Executrix of Ayres P. Merrill and William N. M. Merrill.

To the supreme court:

In pursuance of an order of said court, dated the twenty-ninth day of January, 1880, whereby all the issues in this action were referred to me, the undersigned, as sole referee to hear, determine, and report upon the same, I do hereby report that I have been attended by the attorneys and counsel for the respective parties, plaintiff and defendant-, in this action *action*, and have taken their proofs and he-rd their arguments and have considered thereof, and hereby determine and report as matters of fact—

First. That on or about the third day of April, 1859, Wil-
160 liam Newton Mercer conveyed by his deed of conveyance unto the said Ayres P. Merrill in trust three hundred and twenty acres of land situate in Macoupin county, Illinois, as mentioned and described in the complaint in this action, to the use and

benefit of his daughter, the plaintiff herein, and the heirs of her body, with power to said trustee to sell and dispose of said trust estate or any part, &c., as is more particularly and at large set forth in the complaint herein and as fully appears by a copy of said deed of trust annexed to and in said complaint referred to as forming part thereof, and that said Ayres P. Merrill, as trustee as aforesaid, took possession of said lands and held the same by virtue of said deed of trust until on or about the fifth day of March, 1861, when
161 he sold and conveyed to D. H. Combs one-half thereof for three thousand dollars, as mentioned in said complaint, and on or about the fifth day of April, 1864, the said Ayres P. Merril sold and conveyed to Samuel and Isaac Snedecker the other half of said lands for thirty-two hundred dollars, as mentioned in said complaint.

And at the time of the first sale he received fifteen hundred dollars in cash as part of the purchase-money, and at the time of the second sales he received eight hundred dollars in cash as part of the purchase-money on that sale, and for the balance of the purchase-money, being thirty-nine hundred dollars, the said trustee accepted and received promissory notes, bearing interest
162 at six per cent. per annum and secured by mortgage of said lands, and said notes have been paid and the mortgages cancelled of record.

Second. That after the making and delivery of said deed of trust the plaintiff intermarried with Samuel Carpenter, who died prior to the commencement of this action.

Third. That in November, 1873, the said Ayres P. Merrill died at the city of New York; that there is no evidence before me that he ever accounted to the said plaintiff or paid to or for her any portion of the said proceeds of sales of said real estate or of the accumulations arising on said proceeds, and no evidence that said proceeds or accumulations or any part thereof have or has been
163 paid to or for said plaintiff or by the estate of said Ayres P. Merrill.

Fourth. That the said Ayres P. Merrill left a last will and testament, bearing date June 22d, 1871, and such will was duly admitted to probate by the surrogate of the county of New York, in the State of New York, in the month of February, 1874, and letters testamentary were afterwards duly issued to said defendant, Maria E. Strange, the executrix in said will named, and a copy of said will is annexed to said complaint and is therein referred to as "Exhibit C."

Fifth. That the moneys received by said trustee as principal and interest, proceeds of said sales to May 1st, 1867, were seventy-nine hundred and eight dollars and fifty-two cents, and the expenses
164 by him incurred, with interest thereon, to the last-mentioned date in respect to said trust fund were five hundred thirty-one dollars and sixty-seven cents, leaving a balance of principal and interest at that time in the possession of said trustee of sixty-five hundred sixty-four dollars and eighty cents.

Sixth. That since the date last mentioned the accumulations of interest on the last above-mentioned sum at six per cent. per annum, with semi-annual rests, the first of which is made on November 1st,

1867, being six months after all proceeds of sales had been received of said trustee, amount, with the principal, on this first day of
165 July, 1880, to fifteen thousand six hundred eighty-one dollars and fifty-four cents.

Seventh. That the said trustee, in breach of said trust and in derrogation of plaintiff's rights has failed to pay over or account to the plaintiff for the income of said proceeds of sale, but he has expended out of said proceeds of sale of said lands four hundred seven dollars and seventy-four cents thereof for commissions, taxes, &c., on or before August 18th, 1866, and on said sum there has accrued interest amounting to one hundred twenty-three dollars and ninety-three cents, which, together, amount to five hundred thirty-one dollars and sixty-seven cents, as above mentioned.

166 Eighth. That at the time of his death, as above mentioned, the said Ayres P. Merrill was seized and possessed, claiming the same in fee, of the real estate situate in Memphis, Tennessee, mentioned in the pleadings and exhibits in this action and in part particularly described in Exhibit D, annexed to said complaint and referred to in said will as numbers 98 & 59 Madison street, and said real estate is still held, possessed, and owned by the estate of said decedent.

Ninth. That the said defendant, Maria E. Strange, pursuant to the provisions of the said trust deed, and also by the said will of said Ayres P. Merrill, became entitled to become the suc-
167 cessor of him as trustee of said trust, but she has not applied to be appointed such successor or executed said trust or any part of the same, and she has neglected and refused to become such successor and to execute the said trust, and she has refused to render any account of said trust fund or any part of it, and she denies by her answer herein that she is at all responsible in the premises in anywise.

Tenth. That there has been produced before me no evidence of any indebtedness of the estate of Ayres P. Merrill other than of the moneys above mentioned.

Eleventh. That the defendant, Maria E. Strange, claims as
168 devisee under said will and also as grantee of said Ayres P. Merrill to be seized of a portion of the real estate in Memphis, Tennessee, mentioned in said complaint and in said Ayres P Merrill's said will, referred to at the time of the date of said will as part of his real estate, and her claims of said real estate as grantee of said Ayres P. Merrill is pursuant to a deed of conveyance, a copy of which is annexed to and is mentioned in said complaint as Exhibit D.

Twelfth. That the said last-mentioned deed, though dated the 3d of December, 1867, and executed by said Ayres P. Merrill the 30th of December, 1867, which was prior by nearly six years to
169 his death, in November, 1873, appears to have been recorded in the office of registry of deeds in Memphis aforesaid after his death, namely, on the 27th day of December, 1873, and there is no evidence before me of any delivery of said deed by said Ayres P. Merrill other than the fact of the registry aforesaid, and in view of

the fact that as executrix of said will of Ayres P. Merrill said deed would have come into the possession of said Maria E. Strange, not as grantee but as executrix, and after devise of the same premises by said will attempted to be made there is not sufficient evidence of a delivery of said deed by said Merrill to said Strange or of
170 the payment of any consideration or the existance of any consideration for such delivery.

I further find and report as matters of law—

First. That there is due and owing to the plaintiff by the estate of the above-mentioned Ayres P. Merrill, deceased, for principal and interest to the date of this my report, the sum of fifteen thousand six hundred & eighty-one dollars and fifty-four cents.

Second. That in so far as the above-mentioned deed of conveyance of Ayres P. Merrill to Maria E. Strange affects the above-mentioned indebtedness of the estate of Ayres P. Merrill the said deed was and is absolutely null and void from the beginning.

171 Third. That any devise or bequest in said last will and testament of Ayres P. Merrill in favor of any person or persons whatsoever is subject to the payment of the whole amount of principal and interest and costs and allowances which may be adjudged to be due in this action, and also to all interest to accrue on said principle, &c., until paid.

Fourth. That the net accumulations of interest upon the sixty-two hundred dollars, proceeds of said sales by said trustee made, being nine thousand four hundred eighty-one dollar- fifty-four cents, belongs and is payable directly to the plaintiff in this action, and the said principal sum of sixty-two hundred dollars should
172 be held in trust by a suitable and proper trustee, to be appointed for the purpose of taking charge of such last above-mentioned principle sum and investing the same and paying the income to said plaintiff for the term of her natural life, and on her death disposing of said fund pursuant to the terms of the trust as mentioned and provided in the aforesaid deed of trust made, executed, and delivered as aforesaid by the said William Newton Mercer.

Fifth. That the plaintiff should have judgment against the defendant, Maria E. Strange, as executrix, &c., pursuant to the foregoing findings of fact & law.

Dated July 1st, 1880.

173 THOMAS H. REDMAN, *Referee.*

174 *Judgment on Report of Referees. Originally Entered Aug. 5th, 1880.*

Supreme Court of the State of New York, County of New York.

ANNA MERCER CARPENTER

vs

MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayers P. Merrill, and WILLIAM N. M. MERRILL.

Judgment.

This action, being at issue and having been duly referred to Thomas H. Rodman, Esq., as referee, to hear and determine the issues joined therein, and the report of the said referee having been duly filed, whereby he finds to be due from the estate of said Ayers P. Merrill six hundred and eighty-one dollars and sixty-four cents on the day of the date of his report, being July 1st, 1880;

175 And that in so far as the deed of conveyance of Ayers P. Merrill to Maria E. Strange, dated December 3rd, 1867, and recorded in the office of registry of deeds, in Memphis, State of Tennessee, on the twenty-seventh day of December, 1873, affects the above-mentioned indebtedness of the estate of said Ayers P. Merrill, the said deed was and is absolutely null and void from the beginning;

And that any devise or bequest in said last will and testament, bearing date June 22nd, 1871, and duly admitted to probate by the surrogate of the county of New York, in the State of New York, in the month of February, 1874, in favor of any person or persons whatever is subject to the payment of the whole amount of principal and interest and costs and allowances which may be

176 adjudged to be due in this action, and also to all interest to accrue on said principal, &c., until paid;

And that the net accumulation of interest upon sixty-two hundred dollars, proceeds of the sales mentioned in said report, as made by said Ayers P. Merrill, as trustee of plaintiff, being $9,482.54, belongs and is payable directly to said plaintiff, and the said principal sum of sixty-two hundred dollars (6,200.00) should be held in trust by a suitable trustee, to be appointed for the purpose of taking charge of such above-mentioned principal sum and investing the same and paying the income to said plaintiff for the term of her natural life, &c., as more fully appears by said report;

And that said plaintiff have judgment against the said

177 Maria E. Strange, as executrix, of said estate;

And it appearing that the costs and disbursements of said plaintiff have been duly adjusted herein at five hundred five dollars and six cents, including interest on the said amount reported due to plaintiff on July 1st, 1880, from that date to the date of this judgment, being, $88.86;

And an allowance additional to said sums having been duly made by the said court to said plaintiff of two hundred and fifty dollars;

And said several sums above mentioned together amounting to sixteen thousand four hundred and thirty-six dollars and seventy cents:

Now, on motion of James M. Baldwin, attorney for plaintiff herein, it is ordered and adjudged—

1st. That Anna M. Carpenter, the plaintiff in this action,
178 do recover of or against the estate of the said Ayers P. Merrill, deceased, and of the executrix as such, or of any person or persons having the possession, custody, or control of said estate or part thereof, the sum of sixteen thousand four hundred and thirty-six dollars and seventy cents, hereby adjudged to be due to plaintiff, or so much thereof as said estate or any part thereof will pay.

2nd. That all of the above-mentioned sum of $16,436.70 paid to the said plaintiff or her said attorney, except sixty-two hundred dollars thereof, which last-mentioned sum shall be paid to a suitable person to be appointed by said court as trustee for the purposes above referred to, and that such appointment be made on notice by plaintiff to defendant, William N. M. Merrill, or his attorney herein.

179 3rd. That the above-mentioned deed of conveyance by Ayers P. Merrill to Maria E. Strange is hereby adjudged to be absolutely null and void from the beginning, so far as the same in anywise affects the above-mentioned indebtedness of said estate to said plaintiff.

4th. That any bequest or devise in said last will and testament of said Ayers P. Merrill contained in favor of any person or persons whatever is subject to the payment of the whole amount above mentioned as due from said estate to plaintiff, and to interest thereon at the rate of 6% per annum until paid.

5th. That plaintiff have execution against the property which was of said Ayers P. Merrill at the time of his death for the
180 amount last above mentioned, and interest thereon until paid, besides sheriff's fees and expenses as provided by law.

Endorsed: Filed August 5th, 1880, 2 o'clock 55 m.

All of which we have caused by these presents to be exemplified and the seal of our said supreme court to be hereunto affixed.

Witness Francis A. Macomber, justice at the city of New York, the 10th day of September, in the year of our Lord one thousand eight hundred and eighty, of our Independence the one hundred and fifth.

[SEAL.] WILLIAM A. BUTLER, *Clerk.*

I, Francis A. Macomber, presiding justice of the supreme court of the State of New York for the city and county of New York, do

hereby certify that Wm. A. Butler, whose name is subscribed
181 to the preceding exemplification, is the clerk of the said county of New York and clerk of said supreme court for said county, duly appointed and sworn, and that full faith and credit are due to his official acts.

I further certify that the seal affixed to the exemplication is the seal of our said supreme court, and that the attestation thereof is in due form of law.

Dated New York, Sept. 10th, 1880.

FRANCIS MACOMBER,
Justice Supreme Court.

STATE OF NEW YORK, }
City & County of New York, } *ss:*

I, William A. Butler, clerk of the supreme court of said State in and for the city and county of New York, do hereby certify that Francis A. Macomber, whose name is subscribed to the pre-
182 ceding certificate, is presiding justice of the suprme court of said State in and for the city and county of New York, duly elected and sworn, and that the signature of said justice to said certificate is genuine.

In testamony whereof I have hereto set my hand and affixed the seal of the said court this 10th day of Sept., 1880.

[SEAL.] WILLIAM A. BUTLER, *Clerk.*

Subpœna to Ans. Issued 4th day of Feb'y, 1881. *R. J. Black, C. & M.*

The State of Tennessee to the sheriff of Shelby county:

Summon Maria E. Strange, ex't'x of A. P. Merrill, dec'd; Maria E. Strange, Ayers A. Strange, Alice M. Mitchell, Jane Sarah Strange, Lydia E. Creighton, if to be found in your county, to appear before
183 the chancery court of Shelby county, at the court-house, in Memphis, Tenn., on the first Monday in March next, then and there to answer the bill of complaint of Anna M. Carpenter, a copy of which accompanies this writ. Herein fail not and have you then and there this writ.

Witness Robert J. Black, clerk & master of said court, at office, in Memphis, this first Monday in October, 1880.

R. J. BLACK,
Clerk & Master,
By E. B. McHENRY,
D. & C. & M.

Return.

Came to hand 4th day of February, 1881, and executed on all the within-named parties by reading this writ to them, and left a copy of the bill with Mrs. M. E. Strange.

P. R. ATHY, *Sheriff,*
By C. R. STEWART, *D. S.*

184 *Order App. G'd'n ad Litem. Entered March 8th*, 1881, *R. D. O. B.* 3, *p.* 279.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.* } R. 3912.

In this cause it appearing that the defendants, Ayers A. Strange, Fannie Mitchell, Jane Sarah Strange, and Lydia E. Creighton, are minors, under the age of 21 years, and have no regular guardian, and that they are properly before the court by service of subpœna and publication, it is therefore ordered that Samuel P. Walker be, and he is hereby, appointed guardian *ad litem* to represent and defend said minors in this cause.

Done at rules this 8th day of March, 1881.

R. J. BLACK, *C. & M.*,
By E. B. McHENRY,
D. C. & M.

185 *Motion to Dismiss. Filed April 5th*, 1881. *R. J. Black, C. & M.*

ANNA M. CARPENTER *vs.* MARIA E. STRANGE *et al.*

Defendants, A. A. Strange, Fannie Mitchell, and Sarah Strange, by their guardian *ad litem*, S. P. Walker, move to dismiss so much of the complainant'- bill in this cause as seeks to enforce the alleged rights of complainant as a devisee of A. P. Merrill, deceased, for the reason that it appears by the bill that the devise to complainant was conditioned upon the renunciation by her of all claim against the estate of said testator for the fund held by him in trust for complainant.

The bill not only fails to show a compliance with this con-
186 dition, but affirmatively shows the contrary, to wit, that complainant has elected to claim and sue for said trust fund.

The bill shows no sufficient reason for non-compliance with the said condition nor for setting — aside as null and void; wherefore said defendants pray judgment of so much of the said bill as aforesaid that it may be dismissed, and that defendants be not required to answer the same.

S. P. WALKER,
Guardian ad Litem.

Order Overruling Motion to Dismiss. Entered July 1st, 1881, M. 22, p. 64

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.* } R. 3912.

And

ANNA M. CARPENTER
vs.
MARIA E. STRANGE. } R. 2615.

187 The motion of the minor defendants, by their guardian *ad litem*, to strike out so much of bill No. 3912, R. D., as sets up a claim under the will of A. P. Merrill was this day considered, when solicitors for Mrs. Carpenter insisted that no such claim was asserted, and that for their client they disclaimed any right or purpose to hold or claim a devise under the will; whereupon said motion was overruled; and then the motion of respondent, M. E. Strange, to dismiss bill 3912 as to her because another bill is pending in this court against her for the same thing, and, if that be not done, that said bill No. 2615, R. D., be dismissed, was heard; but the court being of opinion that the motion is premature and cannot now be properly raised, it is overruled.

188 *Order pro Con. Ent. 8 day of Aug., 1881, R. D. O. B. No. 3, p. 382.*

Chancery Court of Shelby County.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Ex't'x, *et al.* } R. 3912.

In this cause defendants, Maria E. Strange, ex't'x, and Maria E. Strange individually, Ayres A. Strange, Alice M. Mitchell, Fanny Mitchell, Jane Sarah Strange, Lydie E. Creighton, Ayres P. Merrill, and William N. M. Merrill, having been brought in the court by legal process of law citing them to appear and defend the suit of complainant on or before the first Monday in March, 1881, and, having failed, and after entry of July 1st, 1881, complainant, on M. B. 32, p. 64, on motion of complainants, — is pleased to and does
189 order that the allegations of the bill be taken for confessed as to defendants and the cause proceeded with *ex parte*.

This 8th day of August, 1881.

R. J. BLACK,
Clerk & Master.

Proof of Publication. Filed Sept. 26th, 1881. *R. J. Black, C. & M.*

Creditors' notice.

In the Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Ex'tr'x of A. P. Merrill, Deceased. } R. 3912.

It appearing from the bill in this cause that it is a proceeding instituted to wind up and set- the estate of A. P. Merrill, deceased, as an insolvent estate under the laws of Tennessee, and an order of court having been entered directing publication to be made
190 to creditors, it is therefore ordered that all parties claiming to be interested in said estate make their appearance at the court-house of Shelby county, Tenn., on or before Tuesday, March 15th, 1881, and have themselves made parties hereto and present and file their demands or the same will be forever barred, and that a copy of this order be published once a week for 4 successive weeks in the Memphis Appeal.

This the 2nd day of Feb'y, 1881.

A copy.

Attest: R. J. BLACK, *C. & M.*,
By E. B. McHENRY,
Deputy Clerk and Master.

STATE OF TENNESSEE, *County of Shelby:*

Personally appeared before —— ——, clerk of the chancery court of Shelby county, Tenn., Henry White, business manager of
191 the Appeal, who made oath in due form of law that the accompanying creditor's notice was published in the editions of February 3, 10, 17, & 24, 1881, of the Memphis Appeal, and that the publication fee has been paid.

HENRY WHITE.

Subscribed and sworn to before me this Sept. 26th, 1881.

E. B. McHENRY,
D. C. & M.

Proof of Publication. Filed Sept. 26th, 1881. *R. J. Black, C. & M.*

Non-resident notice.

In the Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Ex'tr'x of A. P. Merrill, Deceased. } R. 3912.

It appearing from affidavit in this cause that the defendants, Fannie Mitchell, Ayres P. Merrill, and William N. M. Merrill,

192 are non-residents of the State of Tennessee, it is therefore ordered that they make their appearance herein at the court-house of Shelby county, in Memphis, Tennessee, on or before the first Monday in March, 1881, and plead, answer, or demur to complainant's bill, or the same will be taken for confessed as to them and set for hearing *ex parte*, and that a copy of this order be published once a week for 4 successive weeks in the Memphis Appeal.

This 2nd day of Feb'y, 1881.

A copy.

Attest: R. J. BLACK, *C. & M.*,
By E. B. McHENRY,
D. C. & M.

STATE OF TENNESSEE, *County of Shelby:*

Personally appeared before me, —— ——, clerk of the chancery court of Shelby county, Tennessee, Henry White, business man-
193 ager of the Appeal, who made oath in due form of law that the accompanying non-resident notice was published in the editions of February 3, 10, 17, & 24, 1881, of the Memphis Appeal, and that the publication fee has been paid.

HENRY WHITE.

Subscribed and sworn to before me this September 26th, 1881.
E. B. McHENRY, *D. C. & M.*

Order of Reference. E. Nov. 8th, 1881, M. 33, p. 22.

ANNA M. CARPENTER *vs.* M. E. STRANGE.

This cause came on for order, when, upon inspection of the pleadings, this was adjudged to be a proper case for a reference to the master, in order to ascertain the amount of complainant's demand against the defendant. The master is therefore directed to
194 hear proof and report showing the state of accounts between the parties at as early a day as practicable.

Order Setting Aside pro Con. E. Nov. 26th, 1881, M. 33, p. 185.

In Chancery Court of Shelby County, Tenn.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE. } R. 3912.

On motion of defendants, and good cause shown, it is ordered by the court that the *pro confesso* taken before the clerk and master in this cause in August, 1881, and the order of reference made since that time be both set aside and annulled, but this is done upon the express condition agreed to by defendants that they do file their answers in the cause within 20 days from the date of this order.

195 *Answer of M. E. Strange. Filed 14th Day of Dec.*, 1881. *R. J. Black, C. & M.*

In the Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER *vs.* MARIA E. STRANGE, Exec'x, &c., &c., *et al.*

Defendant, Maria E. Strange, sued as executrix of the last will and testament of Dr. A. P. Merrill, deceased, and in her own right and character as an individual, files this as her answer in both her representative and personal character.

Respondent is one of Dr. A. P. Merrill's daughters. Her father died in the city of New York on November 3rd, 1873, leaving a will, of which complainant's exhibit purporting to be such is believed to be a copy. He was a citizen of the city and State of New York
196 when he died, and his will was probated there and respondent, nominated as such by will, qualified as executrix.

Complainant brought suit in New York and recovered judgment, as charged, against said executrix. Whether Exhibit B with the bill is a correct transcript of the proceedings or not respondent cannot say. She here claims and relies upon the benefit of any and all objections which be properly made to said transcript and judgment as to accuracy, validity, and alleged legal effect.

She is advised and now here insists that said judgment is utterly void in so far as it undertakes to set aside or declare inoperative the deed hereinafter more fully referred to, by which in 1867 her father conveyed to her No. 59 Madison street. In that proceeding the New York court had no jurisdiction of that question.

197 The will of said A. P. Merrill was not probated in Tennessee until the — ——, 1881. It was then probated in the probate court of Shelby county and respondent then qualified in said court as executrix. Prior to that time there was no personal representative of said A. P. Merrill in Tenn. Being made defendant as executrix in the cause No. 1805 on the rule docket of this court mentioned in the bill herein, she did, being then a citizen of New York, residing and qualified as executrix in New York, filed an answer as executrix in said cause number 1805. She was then, however, only executrix in New York, and did not profess or pretend to be such elsewhere.

Respondent has made no settlement as executrix in New York. A bond of the Mutual Storage Co. of Memphis for $1,000.00,
198 owned by said Merrill, came to her hands and she brought it with her when she came or returned to Memphis to live, in 1876. She has used it partly in the payment of taxes and repairs on Memphis real estate and partly in defraying the expenses of herself and family when seeking refuge from the yellow fever, in 1878. A few silver spoons and forks, some clothing which was his personal wardrobe, the one watch and mosaic casket and signet ring mentioned in the will also came into her hands in New York. As executrix in Tennessee she has received no personalty whatever, and

she knows of none which she could have received. He left in New York some household furniture and some china and silver ware,
199 which were taken possession of by his son, Ayers P. Merrill, and which he has retained or disposed of. Respondent was never able to get them. He left a French clock, of which complainant took possession. He left also some old medical books on storage in New York, which were not worth the storage charges and were never claimed. So far as respondent knows and believes this enumeration embraces the whole personal estate left by said A. P. Merrill at his death, except some rent notes made by S. P. Walker for rent of property in Memphis, which respondent has vainly endeavored to collect. If there were other rent notes or debts of any sort due to him they were not collectible, so far as respondent now knows or believes.

The Dr. Mercer watch mentioned in the will Dr. A. P. Merrill a year prior to his decease returned to Dr. Mercer upon his
200 demand or request that it should be returned. Alice Mitchell has the ring bequeathed to her. Respondent has the mosaic casket and the watch bequeathed Ayres A. Strange.

After the death of A. P. Merrill and until the appointment of the receiver in cause No. 1805 in this court respondent, through an agent, collected the rents of the buildings Nos. 98 and 100, owned by said A. P. Merrill in Memphis. Except some small amounts which she paid to complainant and to her brother Mercer respondent expended the whole or very nearly the whole of the rents so collected in paying debts and funeral expenses of said A. P. Merrill, including the transportation of his remains and burial at Memphis, and in paying taxes and for repairs and insurance on said buildings.
201 The house No. 59 Madison street was conveyed to her by her father in 1867. The deed then made to her by her father was delivered to her as soon as made, and has been held by her ever since. She did not have it recorded until after her father's death, because she did not know that registration was necessary or important. For reasons satisfactory to himself, and which respondent believes ought to have been satisfactory, the said A. P. Merrill shows to convey this property to respondent. It was in the form of a gift, and as such was, as respondent is advised, within his competency to make and hers to receive. At the date of said conveyance the said Merrill was amply able to make the gift. He owed no debts whatever, as respondent believes, unless a debt was then due to complainant. He then had money and personal
202 property and an income from a lucrative medical practice. He owned, too, wholly free from incumbrance, the buildings 98 and 100 on Madison street, in Memphis, worth, of themselves, many times over the amount of all his indebtedness. Neither said Merrill nor respondent then lived in Memphis and the property was controled by an agent. For some time—just how long respondent cannot say—before the death of her father the rents for No. 59 and for 98 and 100 and for respondent's own, another real estate in Memphis, were remitted to respondent. She used all as a common fund

for the support of the family, including her father and complainant. Part of the time she kept a boarding-house, in which they lived with her. To this extent she was in possession of No. 59 before
203 her father's death. She was in potential and constructive possession from the date of said decree, in 1867.

The devise of the property by her father was but an affirmance of her title and a continuance of his recognition of her title. She denies expressly that the deed was not delivered. Her father, she distinctly affirms, did deliver said deed to her when it was made and delivered as a vestiture of title in her, and she has so held and regarded it ever since. She took No. 59 under her own control under the deed and not under the will, and she now claims and holds it under said deed. It has been her property, claimed and held by her, ever since the delivery of said deed, in 1867. She will file said deed, or a copy, in evidence, in due time as her muniment of
204 title, and she now here sets up and relies upon said deed and upon her ownership and possession and control under it in bar of complainant's claim herein. For a time, as stated in the bill, No. 59 was held by the receiver appointed in cause No. 1805. Except while he held it she has either rented or occupied it herself or it has been vacant because a tenant could not be found. She has held and believed the property to be her own, and has paid taxes and made repairs and preserve- the property to the best of her ability.

She occupies it now as a boarding-house, and she believes that it is in better condition as to repairs and taxes than Nos. 98 and 100, held by the receiver, and upon which she is informed that well nigh all the income has been expended. She is prepared to
205 show, when required by the court, just what she has received for rents of all the property and how she has disposed of it. She is advised, however, that no such account can be called for in this suit. Respondent does not believe that any debt or claim of debt is asserted by any one against the said A. P. Merrill except complainant. So far as she knows he owed no debts at the time of his death except his board-bill at the St. Cloud Hotel, in New York, and the expenses of his last illness. She believes that his daughter, Anna M. Carpenter, complainant here, stands alone in her claim to be a creditor. Respondent denies emphatically, to the best of her knowledge and belief, that her father owed her any debt at the time of his death. The trust for her, recognized in his will,
206 respondent believes and asserts he had faithfully discharged, and she denies that he had ever received any personal benefit whatever from the trust fund. His lips are sealed concerning it, and what he has said and might have said, except the declaration contained in his will, must be unknown to this court. If, however, in this cause the law shall hold a case for inquiry to have been made she will claim and now gives notice of the claim to rely in the taking of the account upon all offsets, affects, and equities that may be proved. The complainant was an adult, married, and a widow before the trust was created, or rather before the conversion of the

trust property into money. If after that time she was clothed, supported, or maintained by her father his expenditure in
207 that behalf would be properly set off. If investment of the trust fund were made at her instance and request, or in his own best judgment and discretion as trustee, which proved unfortunate, or if, at her request and solicitation, the fund was placed in the hands of another as her own chosen agent and trustee, then matters should be considered where legal debts *is* to be legally and technically ascertained.

So far as family history may be necessary protection only so far will respondent feel called upon to introduce it into this record. Respondent avers that the realty conveyed to A. P. Merrill in trust for complainant was by said Merrill sold and converted into money, as she is informed and believes, beginning as far back as 1861 and ending in April, 1864.

208 The said Merrill removed to New York in 1864 and there resided continuously until his death. Complainant lived also in New York. Respondent is advised that if the change into money was a conversion the statutes of limitation of the State of New York began to run in favor of said Merrill from the dates of his sales and may now be pleaded and relied upon here. She does plead and rely upon them.

As executrix and individually she pleads and relies upon the statutes of limitation of the State of Tennessee of two years and three years and seven years as to estates, and the general statutes of six and of seven years for her probation. As to No. 59 Madison street she relies upon her claim and holding under the deed made and delivered to her by said A. P. Merrill in December, 1867,
209 and the statute of limitation applicable thereto. As executrix she pleads that no personal assets whatever come to her hands to be administered in Tennessee.

Respondent's children, Jane Sarah (called Sazie), and Ayres A., proceeded against as minors, are both now over twenty-one years of age. The bequests of claim No. 3 of the will of said A. P. Merrill have not been in any way, either in whole or in part, paid by respondent.

Claiming No. 59 Madison street as her own under the deed made to her in December, 1867, respondent says that said A. P. Merrill's will left no realty belonging to him except Nos. 98 and 100 Madison street; he left no personal estate except that hereinbefore mentioned.

210 And now, having fully answered, respondent prays to be hence dismissed.

CRAFT & COOPER,
Sol'rs for Resp'd't.

STATE OF TENNESSEE, *Shelby County:*

Before me this day personally appeared Mrs. Maria E. Strange and made oath that the statements made in the foregoing answer are true to the best of her knowledge and belief.

MARIA E. STRANGE.

Sworn to and subscribed before me this 14th day of Dec., 1881.
R. J. BLACK, *C. & M.*

Answer of A. A. Strange et al. Filed Dec. 14th, 1881. R. J. Black, C. & M.

In Chancery Court of Shelby County, Tennessee.

211 ANNA M. CARPENTER, ... } 3912, R .D..
vs.
MARIA E. STRANGE, Ex'tr'x, &c., *et al.* }

The answer of Ayres A. Strange, Sarah Jane (called Sazie) Strange (proceed*ing* against as minors, but now of age), and Alice M. Mitchell.

Defendants Ayers A. and Sarah are children of Mrs. Maria E. Strange; defendant Alice M. is a chield of Mrs. Sarah Mitchell, now deceased, who was a daughter of Dr. A. P. Merrill. She is one of the heirs at law of A. P. Merrill, and all of the defendants are legatees under his will.

For answer to the bill in this cause they say that they have no personal knowledge as to the matters alleged. Their information and belief are fully embodied in the answer of Mrs. Maria E.
212 Strange filed in this cause, to which they refer and which, as matter of information and belief, they adopt as their own. The- especially thus unite with the said Maria E. Strange and adopt her answer in her denial of indebtedness of A. P. Merrill to complainant and in pleading and relying upon, in bar of complainant's claim, all statutes of limitation of the State of New York and of the State of Tennessee applicable in any way to the case.

Defendant Alice has the signet ring bequeathed to her by her grandfather. Excepting this, these defendants have received nothing whatever under said will.

And now, having fully answered, respondents prays to be hence dismissed.

CRAFT AND COOPER,
For Respondents.

213 STATE OF TENNESSEE, *Shelby County:*

Before me personally appeared Ayers A. Strange, Jane Sarah Strange, and Alice M. Mitchell and made oath that the statements in the foregoing answer contained are true to the best of their knowledge and belief.

SAZIE STRANGE.
AYRES A. STRANGE.
ALICE M. MITCHELL.

Sworn to — subscribed before me on this 14th Dec., 1881.
R. J. BLACK, *C. & M.*

Answer of S. P. Walker, Guardian ad Litem. Filed December 15th, 1881. R. J. Black, C. & M.

Chancery Court of Shelby County.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix, *et al.* } 3912, R. D.

214 The answer of Fanny Mitchell and Lydia E. Creighton, minors, by their guardian *ad litem*, S. P. Walker, to the bill of complaint filed against them in the above-entitled cause.

Respondents, for answer, say they are infants, under the age of twenty-one years; that they have no knowledge, information, or belief in respect to the matter set forth in the bill, and they therefore require strict proof of each and every allegation of the bill, and asks that the court may in all respects protect and consider their interests.

Respondents, futher answering, say that as devisees and legatees under his will they are interested in the estate of said A. P. Merrill, deceased.

Complainant claims to be a creditor of said estate.

Respondents are advised that — claim is barred by the statute of limitations of three years, as contained in the Code of Ten-
215 nessee, section 2773; that it is also barred by the statute of six years, as contained in said code, section 2775, and that it is also barred by the statute of seven years, as contained in said code, section- 2281 and 2786.

Respondents plead and rely upon said several statutes in bar of plaintiffs claim.

And, having fully answered, they pray to be hence dismissed.

S. P. WALKER,
Guardian ad Litem.

Claim of Wm. N. M. Merrill. Filed June 19th, 1882. R. J. Black, C. & M.

STATE OF NEW YORK, *County and City of New York:*

Wm. N. M. Merrill, being duly sworn, says that he resides at Stratford, in the State of Connecticut; is thirty years and up-
216 wards of age, and is a son of Ayers P. Merrill, deceased, formerly of Memphis, Tennessee, medical doctor, and who died November, 1873, at New York city aforesaid.

That William M. Mercer in 1857 conveyed to said Ayers P. Merrill 320 acres of land situate in the State of Illinois in trust for the use of defendant during his life, with remainder over to the heirs of body, and in case of his death, leaving no surviving issue, the property aforesaid or the proceeds thereof to descend to deponent's sister

Anna, &c., &c., as will more fully appear on reference to the deed of conveyance of said land made by said Mercer to said Ayers P. Merrill or to the record thereof; that said Ayers P. Merrill sold said lands and received therefor $6,000, in 1860, or thereabouts.

217 That deponent is advised by his counsel and believes it to be true that the estate of said Ayers P. Merrill is liable to pay after deponent's death the said six thousand dollars to deponent's children, if any survive deponent, and, if not, then to deponent's said sister Anna, if she be then living. Wherefore deponent claims said sum to be due from the estate of said Ayers P. Merrill, and also that the same should be realized and paid out of the proceeds of this property and such disposition thereof in trust should be made during deponent's life as may be just and proper in view of all the facts to the case appertaining.

Deponent further says that he has notice of a proceeding now pending in the court of chancery of Tennessee, at Memphis,

218 for a judicial sale of the real estate there which was of said Ayers P. Merrill, for the purpose of paying his debts or so much thereof as said real estate will pay, instituted by deponent's sister, Anna M. Carpenter, judgment creditor for $16,436.70, and lawful interest thereon from, in, or about August, 1880; and that deponent is acquainted with the three parcels of said real estate situate in Madison street, Memphis, Tennessee, and its value, and he believes that on a sale thereof at public auction the whole will not sell for enough to pay said judgment of $16,436.70 and accrued interest, but if it should sell for more than enough, then this deponent claims and insists that any surplus remaining over and above paying said judgment and interest should be applied to the pay-

219 ment and interest of said $6,000 into court or otherwise as may be adjudged to be safe and proper, to the end that on deponent's death the principal sum of six thousand dollars may be paid to and received by the heir or heirs of deponent's body, if any there be, and, if none there be, to deponent's said sister Anna.

WM. N. M. MERRILL.

Subscribed & sworn to by the above-named William N. M. Merrill this 24th day of May, A. D. 1881, before me, a commissioner of deeds for the State of Tennessee residing in New York.

Witness my hand and official seal this 24th day of May, 1881.

[SEAL.] HENRY C. HAWKS,

Commissioner f-r Tennessee, 3 John Street, New York City.

220 *Setting Aside Continuance, &c. End. June 22nd, 1882, M. 35, p. 498.*

ANNA M. CARPENTER
vs.
M. E. STRANGE *et al.* } # 3912, R. D.

The continuance entered in this case on the 19th June is hereby set aside and for naught held. The case will be set for trial on Monday, 29th June, 1882.

Deposition of H. L. Guion Filed June 1st, 1882. R. J. Black, C. & M.

ANNA M. CARPENTER *vs.* MARIA E. STRANGE, Ex'r'x.

Deposition of H. L. Guion, taken by consent of counsel engaged herein for complainants and plaintiffs, said deposition to be
221 read in evidence on trial in behalf of complainant, all formalities waived:

1st Int'y. Please state your name, age, residence, and occupation in 1873 and at the present time.

Ans. Name, H. L. Guion; age, 29; residence, Memphis. I returned from school after the epidemic of 1875 and went to work in my father's office. He was a rental and collecting agent, and I have been so engaged up to the present time.

2nd Int'y. What business was your father engaged in during 1873 and 1874? In whose possession are your father's books, showing collections and disbursements for various persons on account of real estate in his hands?

Ans. Real estate business. I have his old rental and sale books.

3rd. Please look at his books and state if any time during
222 November, 1873, Mrs. Maria E. Strange received any rents then in your father's possession; if so, give the date she received same, where your father collected the same, and from what real estate, and how is the receipt signed.

Ans. On November 17th, 1873, she received $47.50 and signed Mrs. M. E. Strange, ex'trix. The above was collected November 17th, 1875. The real estate he then controlled for Dr. A. P. Merrill was Nos. 59, 98, & 100 Madison St.

4th. Please state what property, real estate, was in your father's charge as agent for Dr. A. P. Merrill at his death, November 3rd, 1873, and state how long that property had been in your father's charge as A. P. Merrill's agent prior to that time.

Ans. Nos. 59, 98, 100 Madison street. The first entry was *in*
223 January 7th, 1871, when he commenced business on his own account; before that time he was employed by Royster, Trezevant & Co.

And further deponent sayeth not.

H. L. GUION.

Cross-examination waived.

HENRY CRAFT,
For Defendant.
S. P. WALKER,
Guardian ad Litem.

Subscribed & sworn to this June 10, 1882.
[SEAL.] DAVID A. FRAZIER,
Notary Public.

Order. Consolidation, &c. E. June 28th, '82, M. 35, p. 530.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Ex'r'x, &c., } R. 1805.

and

ANNA M. CARPENTER
vs.
MARIA E. STRANGE & Other-. } R. 3912.

224 By consent of all parties these two causes are consolidated and the evidence in each case shall be used in the other, if desired, and the cases shall be heard together.

By oversight the formal discharge of J. A. Taylor as receiver in No. 1805, R. D., has been omitted, and now he is formally discharged, his settlement and account having been approved.

And it appearing that, by consent of parties, R. D. Frayser has been acting as receiver since Nov. 22, 1880, by consent, he is appointed receiver, to take effect as of that date upon his giving a proper bond covering his liability from and after said date, this order being intended to extend the receivership to both cases above named.

225 *Record Case A. M. Carpenter vs. M. E. Strange et al., R. 1805.*

Attachment Bill. Filed Jan'y 15, 1875. E. A. Cole, C. & M.

In the First Chancery Court of Shelby County, Tennessee.

ANNA MERCER CARPENTER, a Resident of the State of New York, Complainant,

vs.

MARIA E. STRANGE, Executrix of the Last Will & Testament of Ayres P. Merrill, Deceased, and a Non-Resident of the State of Tennessee & Resident of State of New York, Defendant.

To the Hon. R. J. Morgan, chancellor, &c.:

226 Complainant respectfully shows unto your honor that the defendant is the executrix of the last will and testament of Ayres P. Merrill, dec'd; that said Ayres P. Merrill — on the — day of November, 1873. A copy of said last will and testament is here filed and made Ex. A to this bill (but need not be copied). Complainant makes it Exhibit — to this bill for the purpose only of showing the execution of same and probating of same, and that the bequests were therein made, and that the defendant was made the executrix.

Complainant prays that the words in said testator's will as follows: "A considerable portion of which moneys were lost by depreciation

during the late war and the balance paid over to the Walter
227 Goodman then her trusted friend and agent to be invested for her benefit in Mississippi," may not be taken as part of her complaint; and she charges the said declaration to be wholly untrue and put into said will for wrong and corrupt purposes. Complainant represents that she and the defendant, the executrix, are the daughters of said Ayres P. Merrill.

And complainant further shows to your honor that on the 3rd day of April, 1857, Dr. William Newton Mercer, in consideration of love and affection for complainant and in consideration of said complainant being named after the wife of said Dr. William Newton Mercer and before the marriage of complainant, conveyed to said Ayres P. Merrill, in trust, a certain lot of ground or land lying and being in the county of Macoupin and State of Illinois, containing 320
228 acres. A copy of said deed of trust is here filed and prayed to be made part of this bill as Ex. B, but need not be copied.

Complainant charges that said deed of trust conveyed the land to the said Ayres P. Merrill, in trust for the sole and separate use and benefit of complainant, and said deed was duly executed and delivered to said Ayres P. Merrill by the grantor aforesaid, and said Ayres P. Merrill puts same on record and excepted the trust, and complainant shows that said deed of trust discloses its purposes and considerations, and is as follows: "But the conveyance is nevertheless made in trust for the following purposes and uses and none other: The said Ayres Phillips Merrill shall hold the property herein conveyed to the sole and separate use and benefit of his daughter, Anna
229 Mercer Merrill, and the heirs of her body, and free from the control, debts, liabilities, or contracts of her husband, *and* should she hereafter marry; and the trustee shall have power, whenever he may deem it expedient and proper, to sell and dispose of said trust estate or any part thereof and the proceeds to invest in any other real or personal estate in Illinois or elsewhere, and the estate so purchased shall be held by the trustee for the same uses and purposes and upon the same trusts as are declared in and by this indenture of and concerning the property herein conveyed.

"And the same may be sold and the proceeds reinvested from time to time, in trust, in the manner aforesaid; and in the event of the death of the said Anna Mercer Merrill, leaving no surviving issues from her, the property herein conveyed or the proceeds
230 thereof shall descend to her brother, William Newton Mercer Merrill, and shall be held by said trustee or his successor for the use and benefit of the said William Newton Mercer Merrill upon the same condition and trust hereinbefore declared; and the said trustee shall have further power to appoint a successor in the trust hereinbefore declared by will or by conveyance as in his discretion he may deem expedient."

Complainant charges that after said Ayres P. Merrill accepted said trust and took possession of said land he, on the fifth of March, 1861, as complainant is informed and believes, conveyed to one D. H. Combs one-half of said section, to wit, the northeast quarter of

section 9, township 8, and range 8 west of the 3rd principal meridian, in said State of Illinois.

231 And that the consideration mentioned in said deed is the sum of $3,000; that $1,500 of said consideration was then and there paid to said Ayres P. Merrill in the lawful money of the United States; that a mortgage was then and there given to said Ayres P. Merrill, trustee, by the purchaser Combs for the balance of said $3,000 purchase-money, to wit, the sum of $1,500; and complainant charges that said balance of purchase-money and interest was paid to said Ayres P. Merrill on or before the 29th of April, 1863.

Complainant further charges, as she is informed and believes, that on the 5th day of April, 1864, the said Ayres P. Merrill, trustee as aforesaid, sold and conveyed to one Samuel Snedicker and Isaac Snedicker the other half part of said 320 acres, to wit, the

232 northwest quarter of section 9, township 8 north, and range 8 west of said principal meridian, for the sum of $3,200; and plaintiff believes from the records of said transaction that said Ayres P. Merrill, trustee as aforesaid, received at the date of said sale the sum of $800 in lawful money of the United States, and that a mortgage was given for the balance of $2,400, with interest, to said Ayres P. Merrill.

And on or about the fifth of April, 1864, the principal and interest of said mortgage was duly paid to said Ayres P. Merrill, trustee, in lawful money of the United States.

Complainant here files copies of the records of deeds of said county of Macoupin and State of Illinois, and pray they may be made Exhibit "C" to this bill, but need not be copied.

233 Complainant charges that said Ayres P. Merrill did not keep said money so received for the sole and separate use of this complainant, and in case she should die without issue for the sole and separate use of William Newton Mercer Merrill; and complainant charges that said trustee, in total disregard of his trust and in breach thereof, converted said money to his own use, and the same became absolved in his own business and materially enhanced the value of his own estate. Complainant charges that she became a widow in the year 1860 by the death of her —, Samuel Carpenter, and she looked to her father, the said Ayres P. Merrill, in her deep affliction as her natural adviser and in whom she reposed an unques-

234 tioned trust. In November, 1873, her father, the said Ayres P. Merrill, died; that during his lifetime he did not render an account to this complainant of the trust estate; that complainant is left in utter ignorance of what said Ayres P. Merrill has done with said money, unless the same has been used as aforesaid, which complainant charges and believes; that the said Ayres P. Merrill at the time of his death was a resident of New York, and left by his said will real estate lying in the city of Memphis, Shelby county, Tennessee. Said real estate is believed to be worth about $16,000 or $18,000.

Complainants charges that during the testator's lifetime she loaned him large sums of money and placed same in his hands in trust for

her, to wit, the sum of $4,000, which — is informed was in-
235 vested in real estate lying in said city and county, and said testator has never accounted to her for this sum of money — the interest thereof; that the real estate left by said Ayres P. Merrill lying in the city and county aforesaid is as follows: East part of lot- 355 and 356, 35 x 148½ — on Madison street, in said city, and the same purported to be conveyed to Maria E. Strange by Ayres P. Merrill, by deed, December 3rd, 1867, and recorded in book 98, page 170, register's office, Shelby county (a certified copy, if necessary, will be filed). This deed complainant charges is fraudulent and void. This same property was bequeathed to Maria E. Strange by said A. P. Merrill, the testator. Why he should do this after once making her a deed to it is something complainant cannot answer and calls upon defendant to rise and answer why.

236 Said A. P. Merrill left this other piece of property, to wit, west half of lot 13, in original lot 480, beginning north side of Madison street, 148½ feet east of alley next east of 3rd street, thence east with Madison street 74¼ feet, north 156¾ feet, west 74¼ —, south 156¾ feet to beginning; deeds recorded in book 18, pages 168 and 640, register's office, Shelby county, Tennessee, all lying in the city of Memphis, Shelby county, Tennessee. Complainant further charges said Ayres P. Merrill bequeathed to her "the western portion of a double tenement house purchased of Alei O. Harris, being the house and lot numbered 98 on Madison street, Memphis, Tennessee, to be held and used by her, with all the income to be derived therefrom, during her natural life;" that said bequest is made upon the condition that said plaintiff renounce all claim upon (my) said
237 testator's estate for moneys accruing from the sale of a tract of land in Illinois conveyed (to me) to said testator in trust (for her) this complainant's benefit by Dr. William Newton Mercer, and complainants refers your honor to said conditions, &c., as set out in copy of will here filed. Complainant shows she has not renounced said claim, as required to do, nor has she refused to renounce said claim for the reason she is advised that by virtue of said deed in trust it is impossible for her to release said trust funds, and for the further reason that such a condition is unjust and a most unrighteous requirement. Complainant was well satisfied and believed she would be left penniless by such cruel and unlawful conditions imposed upon her by her said trustee; and
238 complainant believes that he was induced and influenced by the defendant to attempt to commit this cruel fraud upon complainant.

Complainant charges that she is at present without means of support and said life is of a very small value. Complainant charges that said Maria E. Strange, the defendant, is now, by the death of of said Ayres P. Merrill and by the will, the successor of the said Ayres P. Merrill, as trustee of said funds, and said Maria E. Strange is utterly unfit for said position, and that her interest is opposed to this complainant's.

Complainant further charges that at the time of said testator's death he owned nothing of any consequence saved the claim and

liability of complainants for the moneys held by him in
239 trust as aforesaid and the money loaned him as aforesaid in trust. Besides, testator owed a balance, complainant believes, to William Newton Mercer Merrill upon a similar trust as complainant's.

Complainant further charges the executrix, Maria E. Strange, refuses to -count for both and each of the sums of money and interest thereon due complainant, and denies the liability of the estate for same, and refuses to pay same or any portion thereof. The complainant charges the said Ayres P. Merrill at the time of his death was a non-resident of Tennessee; that the executrix, Maria E. Strange, resides in the State of New York.

Complainant, upon information and belief, charges that the said Maria E. Strange is insolvent and has no means, except what
240 she got by the aforesaid will; that she is unfit to have charge of the said real estate; that the taxes on said property are in arrears, and there is danger of complainant's claim being lost forever unless this honorable court will give relief; that complainant's claim now amounts to over $10,000, and maybe more; that the income of the property in Memphis is being collected by the said Maria E. Strange and her agents, and no part is ever paid or offered complainant.

Therefore, in consideration of the premises, complainant prays that the party named in the caption as defendant be made such; that publication be made for her to plead, demur, or answer this bill at the March rules; that a suitable person be appointed by
241 the court as trustee of said funds in place of A. P. Merrill, dec'd; that your honor will decree that the bequest of said life estate in and of said house so as aforesaid bequeathed be taken and held by complainant free from all and every condition in said will, and said condition be decreed to be void and the title to be absolutely vested in complainant, and she be relieved from renouncing any claim from said trust money.

And that the trust estate be declared unaffected by said condition in said will, and a charge upon said testator's estate that said Maria E. Strange, executrix, be compelled to account for and pay complainant the rents and profits received by her of said house since the demise of said testator; that said Maria E. Strange, executrix,
242 be compelled to account as the representative of said Ayres P. Merrill, trustee, to the said complainant as *cestui que trust* of said money so held by said Ayres P. Merrill in trust for said complainant, and if needs be a reference be had if necesary to find out the amount due.

And when same is arrived — that a suitable trustee be appointed by this honorable court to hold same under said trust for the *ces- que trust.*

And complainant prays that said real estate of said testator's estate be attached so as to secure this complainant's claim; that Maria E. Strange be enjoined from disposing of it or any other property of said Ayres P. Merrill, and especially from encumbering or conveying said real estate left by said testator lying in Memphis, Shelby

county, Tennessee, as aforesaid estate, until complainant's
243 claim is satisfied; and complainant would pray the court to appoint a receiver to take charge of the real estate prayed to be attached herein, that he may keep the taxes paid up, houses repaired, &c., as the said Maria E. Strange is incompetent and insolvent and a non-resident of this State, and complainant prays for all proper and necessary orders, decrees, &c., that may be needed in the progress of this cause, and for all general and special relief in and an account of the premises, and she will ever pray; and complainant prays said real estate so attached be held to secure the recovery that complainant may recover on account of this suit or any other one complainant has brought or may bring on account of the premises set forth.

244 This is the first application for extraordinary process in this cause.

ANNA MERRILL CARPENTER,
By FRAYSER, *Sol'r.*

JARNAGIN & FRAYSER, *Sol's.*

R. Dudley Frayser, att'y, makes oath that the matters and facts set forth in the above bill as made on his own knowledge are true and those made on the information of others he believes to be true.

R. DUDLEY FRAYSER.

Sworn to and sub. before me Jan'y 15th, 1875.

R. J. BLACK,
D. C. & M.

Upon comp't giving bond and security in the sum of $500.00 the C. & M. will issue writ of attachment, as prayed for in bill January 15th, 1875.

R. J. MORGAN, *Chan.*

245 EXHIBIT A.

Be it known that I, Ayres Phillips Merrill, M. D., do make and declare this to be my last will and testament, hereby revoking all others previously made:

First. I give and bequeath to my daughter, Anna Mercer Carpenter, the western portion of the double tenement purchased of Adlae O. Harris, being the house and lot numbered ninety-eight (98), on Madison street, Memphis, Tennessee, to be held and used by her, with all the income to be derived therefrom, during her natural life, but upon condition*ed* -at she renounce all claim upon my estate for moneys accruing from the sale of a tract of land in Illinois conveyed to me in trust for her benefit by Dr. W. N. Mercer, a considerable portion of which moneys were lost by depreciation dur-
246 ing the late war, and the balance paid over to the late Walter Goodman, then her trusted friend and agent, to be invested for her benefit in Mississippi. At her decease or upon her declining

the condition as above, then my will is that said property be sold for the benefit of the daughters then surviving of my several daughters.

Second. I will and bequeath to my daughter, Maria Elizabeth Strange, and to her heirs and assigns forever, without the control of her husband, should she marry again, the house and lot numbered fifty-nine (59), on Madison street, in Memphis, Tennessee, being the same formerly occupied by me as my family residence; also all my personal property of every kind and description, to be taken possession of by her at my decease without inventory or appraisement.

247 Third. I will and bequeath to my said daughter, Maria Elizabeth Strange, in trust one thousand dollars each for the benefit of the several daughters of my daughters, Sarah and Eugenia, deceased, surviving me, namely, Alice Moore and Fanny Mitchell and Liddie Eugenia Creighton, and one hundred dollars for the benefit of my grandson, William B. Mitchell, Jr., should he survive, to be employed and invested at the discretion of the said Maria E. Strange.

Fourth. All other property may be sold for the benefit of my children equally who may survive me.

Fifth. I appoint my daughter, Maria Elizabeth Strange, to be sole executrix of this my last will and testament, without any security to be required of her for the faithful performance of
248 her duties as such, and I request that she will give the watch presented me by Dr. Mercer to my son Mercer; my own watch to Ayres A. Strange, my mosaic casket to Sazie Strange, and my signet ring to Alice Moore Mitchell.

In witness whereof I have hereunto set my hand and seal, in the city of New York, this twenty-second day of June, 1871.

(Signed) A. R. MERRILL. [SEAL.]

Signed, sealed, published, and declared to be his last will and testament by the aforesaid Ayres Phillips Merrill, in presence of us, the undersigned, who in his presence, at his request, and in the presence of one another, subscribe our names as witnesses the day and year above-written, and in the said city of New York.

(Signed) HENRY TALMADGE.
HENRY P. TALMADGE.
I. TALMADGE.

249 EXHIBIT B.

This indenture, made and entered between William Newton Mercer, of Laurel Hills, in Mississippi, of the first part, and Ayres Phillips Merrill, of Memphis, Tennessee, of the second part witnesseth: That the said party of the first part, for and in consideration of the sum of $10.00 to him paid by the said party of the second part, the receipt whereof is hereby acknowledge, and in consideration of other conditions to be set forth in this deed, has

granted, bargained, sold, and conveyed, and by these presents does grant, bargain, sell, and convey, to the said party of the second part, his heirs and assigns, all that certain tract of land situate, lying, and being in the county of Macoupin and State of Illinois, known
250 and designated as follows, to wit, the east half section fifteen (15), township eight (8) north, range eight (8) west, of the third (3rd) principal meridian, containing three hundred and twenty acres, more or less:

To have and to hold the aforesaid tract or parcel of land, together with all and singular the privileges and appurtenances thereunto belonging or in anywise appertaining, to the only proper use and benefit of the said party of the second —, his heirs and assigns, forever.

And the said party of the first part, for himself, his heirs, executors, and administrators, does covenant with the said party of the second part that he is lawfully seized, has full right to convey, and will forever warrant and defend, the said tract of land from the claim of him, the said party of the first part, his heirs and assigns, and
251 against the claim or claims of any other person whomsoever claiming by, through, or under him, but against no other claim whatever.

But this conveyance is nevertheless made in trust and for the following uses and purposes and none other: The said Ayres Phillips Merrill shall hold the property herein conveyed to the sole and separate use and benefit of his son, William Newton Mercer Merrill, and the heirs of his body.

And the trustee shall have power, whenever he may deem it expedient and proper, to sell and dispose of said trust estate or any part thereof and the proceeds to invest in any other real and personal estate in Illinois or elsewhere, and the estate so purchased shall be held by the trustee for the same uses and purposes
252 and upon the same trusts as are declared in and by this indenture and concerning the property herein conveyed, and the same may be sold and the proceeds reinvested from time to time in trust in manner aforesaid, and, in the event of the death of the said William Newton Mercer Merrill leaving no surviving issue, the property herein conveyed or the proceeds thereof shall descend to his sister, Anna Mercer Merrill, and shall be held by said trustee or his successor for the use and benefit of the said Anna Mercer Merrill upon the same conditions and trusts hereinbefore declared, and the said trustee shall have further power to appoint a successor in the trust hereinbefore declared by will or by such conveyance as in his discretion he may deem expedient.

253 In witness whereof I, the said W. Newton Mercer, hereunto subscribe my name and affix my seal, at the city of New Orleans, State of Louisiana, on the 3rd day of April, A. D. 1857.

W. NEWTON MERCER. [SEAL.]

Witness-:
H. W. PALFRAY.
EDW. G. STEWART.

STATE OF LOUISIANA, *City of New Orleans:*

Be it remembered that on the twenty-fifth day of November, in the year one thousand eight hundred and fifty-seven, before me, George Rareshide, a commissioner for the State of Illinois, residing in the city of New Orleans and State of Louisiana, duly commissioned and qualified by the executive authority and under the laws of said State of Illinois to take the acknowledgement of deeds
254 and other instruments of writing to be used or recorded therein, personally came and appeared William Newton Mercer, to me personally known to — the party named in and who executed the foregoing conveyance, and acknowledged that he had signed, sealed, and delivered the same as his own voluntary act and deed, for the use- and purposes therein mentioned, on the day and date therein set forth.

In witness whereof I hereunto set my hand and affix my official seal, at New Orleans, the day and year first above written.

[SEAL.] G. RARESHIDE.

UNITED STATES OF AMERICA, *State of Illinois:*

I, O. M. Hatch, secretary of state of the State of Illinois, do hereby certify that George Rareshide, Esq., before whom the acknowl-
255 edgement of the foregoing instrument was taken, is now and was at the time of taking thereof a commissioner of said State in and for the city of New Orleans, in the State of Louisiana, duly authorized and empowered by law to take the same; that I have compared the signature of the foregoing certificate and the impression of his seal thereto attached with the signature of said commissioner and the impression of his seal deposited in my office and verily believe the same to be genuine.

In testimony whereof I have hereunto set my hand and affixed the great seal of the State, at Springfield, this 17th day of December, A. D. 1857.

[SEAL.] O. M. HATCH,
Secretary of State.

Recorded December 28th, 1857.

A. McKAIN DUBOIS, *Cl'k.*

256 STATE OF ILLINOIS, } *ss:*
County of Macoupin, }

I, Henry W. Burton, clerk of the circuit court and *ex officio* recorder of deeds, &c., within and for the county of Macoupin, in the State aforesaid, do hereby certify that the foregoing written pages contain a true and literal exemplification of the record of a deed which was filed and recorded in my office on the 28th day of December, A. D. 1857, in Record "K K," on pages 284, 285, and 286, — reference to the record thereof remaining in my office will fully show.

Witness my hand and the seal of said circuit court, hereto affixed at my office, in the city of Carlinsville, in the said county of Ma-

coupin and State of Illinois, this twenty-second day of July, A. D. 1874.

[SEAL.] HENRY W. BURTON,
Circuit Clerk & ex Officio Recorder, &c.

257 A showing of conveyances of the north half of section nine and the east half of section fifteen, all in township number eight north, of range number eight west, 3rd P. M., in Macoupin county, State of Illinois.

Dates.

1835, April 28th.

Patents. United States to W. N. Mercer and J. Livington. Entry of the N.½ 9 & E.½ 15, 8, 8 west, 3d P. M., Macoupin county, Illinois.

1840. July 18th.

Quitclaim deed. John Livington and wife to William Newton M'rc'r. Recorded April 15th, 1841, Record K, page 547. N. ½ 9 & E. ½ 15, 8, 8, and other lands.

1857, April 3rd.

Sp'l warranty deed. W. Newton Mercer to Ayers Phillips Merrill, in trust for William Newton Mercer Merrill. Recorded Dec. 18th, 1857, Record "K K," page 284. E. ½ sect. 15, T. 8, R. 8 west,
258 &c. For the sole and separate use & benefit of Wm. N. M. & heirs of his body, &c.

1859, Dec. 28th.

Warranty deed. Ayres Phillip Merrill to Samuel Snedecker & Isaac Snedecker. Recorded Feb'y 25th, 1860, Record "O O," page 431. E. ½ sect. 15, town. 8, range 8. For consideration of sum of $6,000.

1860, Feb'y 23rd.

Mortgage for $5,000. Samuel Snedecker and Isaac Snedecker to Ayres P. Merrill. Recorded Feb'y 25th, 1860, Record "77," page 538. E ½ 15, 8, 8 west, &c. Satisfied May 18th, 1863, by Alf. S. Mayfield, att'y-in-fact, &c.

1861, March 5th.

Warranty deed. Ayres P. Merrill to T. H. Combs.—Recorded April 13th, 1861, Record "X X," page 130. N. E. ¼ 9, 8, 8 west, &c. For consideration $3,000.00.

1861, March 5th.

259 Mortgage for $1,500. D. H. Combs to Ayres P. Merrill. Recorded April 13th, 1861, Record "L L," page 64. N. E. ¼ sect. 9, 78, R. 8. Satisfied April 29th, '63, att'y-in-fact, &c.

1863, March 14th.

Power of attorney. Ayres P. Merrill to Alfred S. Mayfield. Recorded April 27th, 1863, Record "A G," page 40. To enter satisfaction mortgage from D. H. Combs, March 5th, '61, & of mortgage from Samuel and Isaac Snedecker, Feb'y 3rd, 1860.

1864, Apr. 5th.

Warranty deed. Ayres P. Merrill to Samuel Snedecker and Isaac Snedecker. Recorded June 8th, 1864, Record A H, page 184. N. W. ¼ sect. 9, T. 8, R. 8. For consideration of $3,200.00.

Mortgage for $2,400. Samuel Snedecker and Isaac Snedecker to Ayres P. Merrill, trustee. Recorded April 29th, 1864,
260 Record "A S," page 90. N. W. ¼ sect. 9, T. 8, R. 8. Satisfied by 6 c. Deed as follows.

1866, Oct. 9th.

Quitclaims deed. Ayres P. Merrill to Samuel Snedecker and Isaac Snedecker. Recorded October 30th, 1866, Record "A P," page 261. N. W. ¼ sect. 9, T. 8, R. 8, to satisfy foregoing mortgage.

Attest: H. W. BURON,
Circuit Clerk and ex Officio Recorder of Deeds, &c.,
Macoupin County, Illinois.

Cost Bond.

We, Anna Mercer Carpenter and surety, J. G. Lonsdale, acknowledge ourselves indebted to Maria E. Strange in the sum of two hundred and fifty dollars, to be void if the said A. M. Carpenter,
261 complainant in a bill which has this day been filed in the first chancery court of Shelby county against the said M. E. Strange, shall pay all such costs as may be answered against her by the court in the decrees and orders in said bill.

This 15th day of January, 1875.

ANNA MERCER CARPENTER,
By R. DUDLEY FRAYSER.
J. G. LONSDALE.

Attachment Bond.

We, Anna Mercer Carpenter and surety, J. G. Lonsdale, acknowledge ourselves indebted to Maria E. Strange, ex'tr'x, in the sum of five hundred (500) dollars, to be void if the said complainant, A. M. Carpenter, who has this day filed a bill in the first chancery court of Shelby county praying an attachment therein against the estate of the said defendant, M. E. Strange, executrix, for the sum
262 of — dollars, and obtain the same upon the execution of this bond, shall prosecute the said attachment with effect, or, in

case of failure, pay the defendant all costs which may be adjudged against complainant, and also all such damages as defendant may sustain by the wrongful suing out of the attachment.

Witness our hands and seals this 15th day of January, 1875.

ANNA MERCER CARPENTER, [SEAL.]
By R. DUDLEY FRAYSER. [SEAL.]
J. G. LONSDALE. [SEAL.]

Attachment. Issued 15th Day Jan'y, 1875. *E. A. Cole, C. & M.*

The State of Tennessee to the sheriff of Shelby county:

Whereas Anna Mercer Carpenter filed her bill against Maria E. Strange, executrix of A. P. Merrill, deceased, in the first chan-
263 cery court of Shelby county and obtained from R. J. Morgan, judge, an order for the issuance of an attachment against the estate of the said A. P. Merrill, deceased, & bond having been given as required by law in attachment cases, you are, therefore, commanded to attach so much of the estate of the said A. P. Merrill, deceased, and particularly east part of lots 355 and 356, 35 x 148½ feet, on Madison street, in said city; also west half of lot 13, in original lot 480, beginning north side Madison street, 148½ feet east of alley next east of 3rd street; thence east with Madison street 74¼ feet, north 156¾ feet, west 74¼ feet, south 156¾ feet to the beginning, to satisfy the debt of complainant, which, it is alleged in said bill, is about $10,000.00 *dollars* and costs, according to the complaint,
264 and such estate, unless replevied, so to secure that the same may be liable to further proceedings thereon to be had at the said court, to be held for the county of Shelby on the first Monday in February next, at the court-house, in the city of Memphis, when & where you will make known how you have executed this writ.

Witness E. A. Cole, clerk and master of our said court, at office, in the city of Memphis, the first Monday in October, 1874, and 99th year of American Independence.

E. A. COLE, *C. & M.*,
By E. B. McHENRY,
Dep. C. & M.

Return.

Came to hand 15th day of January, 1875, and served the within attachment on the within-described real estate as the property of the def't January 15th, 1875.

C. L. ANDERSON, *Sh'ff*,
265 By W. W. COLEMAN, *D. Sh'ff.*

Proof of Publication. Filed April 30th, 1875. E. A. Cole, C. & M.

Non-resident notice.

In the First Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix, &c. } No. 1805.

It appearing from affidavit in this cause that the defendant, Maria E. Strange, executrix of the estate of A. P. Merrill, deceased, is a citizen of New York and a non-resident of the State of Tennessee, and A. P. Merrill, her testator, was a non-resident of Tennessee, — died leaving property in Tennessee; that the above suit was commenced January 15th, 1875, wherein she (complainant) alleges that
266 said defendant, executrix of the last will and testament of A. P. Merrill, deceased, is indebted to her — large sums of money, to wit, $10,000 or more, on account of a conversion by her testator of certain trust funds, as charged in the bill, and her failure to account therefor, etc., and that an attachment writ has been issued and returned levied on the property of Maria E. Strange and property of the estate of said testator, it is therefore ordered that she make her appearance herein at the court-house, in the city of Memphis, Tennessee, on or before the first Monday in March, 1875, and plead, answer, or demur to complainant's bill, or the same will be taken for confessed as to her and set for hearing *ex parte*, and that a copy of this order be published once a week for four successive weeks in the Memphis Appeal.

267 This 16th day of January, 1875.

A copy.

Attest: EDMUND A. COLE,
Clerk and Master,
By R. J. BLACK, *D. C. & M.*

JARNAGIN & FRAYSER,
Sol's for Complainant.

STATE OF TENNESSEE, *County of Shelby:*

Personally appeared before me, E. A. Cole, C. & M. of the first chancery court of Shelby county, Tennessee, Henry White, who made oath in due form of law that the accompanying non-resident notice was published in the editions of January 17, 24, 31, and February 7, 1875, of the Daily Memphis Appeal, and that the publication fee has been paid.

HENRY WHITE,
Collector Appeal Publishing Co.

Subscribed & sworn to before me this April 30th, 1875.

R. J. BLACK, *D. C.*

268 *Decree pro Confesso and Appointiny a Receiver. Ent. Apr. 30, 1875, M. B. 11, p. 587.*

A. M. CARPENTER *vs.* MARIA E. STRANGE, Executrix, &c.

This cause coming on to be heard this day upon motion of counsel for complainant for a decree *pro confesso* against the defendant, and it appearing to the court that due and legal service has been made upon defendant according to law, and said defendant having failed to plead, answer, or demur in the time required by law, it is hereby adjudged and decreed that the allegations of the bill be taken for confessed as to all things therein contained as to the defendant, and said cause will be set for hearing *ex parte* as to
269 defendant; and on this same day came the counsel for the complainant and moved the court for the appointment of a receiver to take charge of the property (real estate) in this cause and rent the same out on the best terms to be had, keep up the repairs on the property, insure the same, and pay the taxes thereon, said receiver to account every six months to this court by filing his account of receipts and disbursements; and it appearing to the court that a receiver should be appointed and that J. A. Taylor would be — suitable and proper person to be receiver, he is hereby appointed and will, on the execution of a bond for $2,000 according to law, enter upon the trust, and Milton P. Jarnagin and R. Dudley Frayser are permitted to become sureties on the receiver's bond if pecuniarily sufficient.

270 April 30th, 1875.

R. J. MORGAN, *Chancellor.*

Order Setting Aside pro. Con. Ent. Oct. 22nd, 1875, M. B. 12, page 438.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix of Ayres P. Merrill, Deceased. } 1805, R. D.

In this cause, upon motion of defendant, it is ordered by the court that the order for *confesso* heretofore entered against her be set aside and she is allowed to file her answer to complainant's bill, which is accordingly done.

Answer of M. E. Strange. Filed Oct. 22nd, 1875. Enrolled in A. B. 10, page 504. E. A. Cole, C. & M.

271 In the First Chancery Court of Shelby County, Tennessee.

ANNA MERCER CARPENTER, a Resident of the State of New York, Complainant,

vs.

MARIA E. STRANGE, Executrix of the Last Will and Testament of Ayres P. Merrill, Deceased, & a Non-Resident of the State of Tennessee and Resident of the State of New York, Defendant.

The answer of Maria E. Strange, the defendant, to the bill of complaint of Anna Mercer Carpenter, complainant.

This defendant, now and at all times hereafter, saving and reserving to herself all manner of benefit and advantage of exception to the many errors and insufficiencies in the complainant's said
272 bill of complaint contained, for answer thereto, or unto so much or such parts thereof as this defendant is advised is material for her to make answer unto, *she* answers and says she admits that she is the executrix of the last will and testament of the said Ayers P. Merrill, deceased; that she is a widow, having no husband living; that the said Ayres P. Merrill departed this life on the 3rd day of November, 1873; that the complainant and the defendant are the daughters of the testator, Ayres P. Merrill, deceased; that the complainant became a widow in the year 1860 by the death of her husband, Samuel Carpenter; that the said Ayres P. Merrill at the time of his death was a resident of New York State and left by his will two pieces of real estate only; that the said testator devised a certain piece of real estate or property by his said
273 last will and testament, described in the bill of complaint of the *the* complainant as the west half of lot 13, in original lot 480, beginning north side of Madison street, 148½ feet east of alley next east of Third street; thence east with Madison street 74½ feet, north 156¾ feet, west 74½ —, and south 156¾ feet to the place of beginning, upon which are standing two tenement houses or a double tenement hous-, numbered 98 and 100 Madison street, in the city of Memphis, Shelby county, Tennessee; that the said testator, Ayres P. Merrill, deceased, devised to the complainant the western portion of the last above-described premises, being the western half of the double tenement house "purchased of Adlai O. Harris, being the house and lot numbered 98 on Madison street, Memphis, in Ten-
274 nessee, to be held and used by her during her natural life."

That said devise was made upon the condition that the complainant renounce all claim upon the estate of Ayres P. Merrill, the said testator, for money accruing from the sale of a tract of land in Illinois, conveyed to the said Ayres P. Merrill, in trust for the benefit of the complainant, by Dr. William Newton Mercer, as by reference to the said last will and testament of the testator will more fully and at

large appear; that the complainant has not renounced her said claim against said estate, as by said will she was required to do; that at the time of said testator's death he owned nothing of any consequence; that the defendant, the executrix of the said last will and testament, refuses to account for both and each of the sums
275 mentioned in complainant's bill of complaint as "the claim and liabilities of complainant for the moneys held by him in trust as aforesaid and the money loaned him as aforesaid in trust" and the balance in said bill alleged to have been owed to William Newton Mercer Merrill upon a similar trust as complainant's; that the said Ayres P. Merrill at the time of his death was a non-resident of the State of Tennessee; that this defendant, the executrix, resides in the State of New York; that the taxes upon the real estate devised by the said testator are in arrears; that the income of the property devised by the said testator in Memphis, Tennessee, was, at the time of the filing of complainant's bill of complaint, being collected by this defendant and no part thereof was paid to the complainant; and this defendant alleges and shows
276 that the rent and income of the said premises devised by the will of the said testator accruing subsequently to the death of the testator, after deducting therefrom the expenses of its collection, has been applied by this defendant to the payment and reduction of the taxes or assessments imposed by law upon said premises and to the payment of the expenses of necessary repairs thereon; and this defendant further alleges that after the death of the testator she tendered to the complainant payment of the rent accruing from the premises devised by said will to the complainant, and that the complainant refused to except the same; and this defendant, further answering, denies that the words stated and quoted in the bill of complaint herein as follows: "A considerable portion of which moneys
277 were lost by depreciation during the late war and the balance paid over to the late Walter Goodman, *the* her trusted friend, an agent, to be invested for her benefit in Mississippi," were or are, wholly or in any part, untrue, or that they or any of them were put into said testator's will for wrong or currupt purposes, but, on the contrary thereof, the defendant alleges and avers and shows to this honorable court that the said words, each and every of them, were and the statement and declaration thereby made was an- is in all respects true.

And this respondent, further answering, denies that the said testator devised by his said will or left, upon his decease, the real estate which is described in complainant's bill of complaint as follows:
278 "East part of lots 335 and 356, 35 x 148½ —, on Madison street, in the city of Memphis, Tennessee," the same having theretofore been conveyed by him to this defendant; and this defendant, further answering, admits that said last above-described house and lot and premises were conveyed to this defendant by the said Ayres P. Merrill, the testator, by deed dated December 3rd, 1867, and recorded at the time in the bill of complaint stated; and this defendant denies that the said deed of conveyance was made in fraud of complainant's rights, or that the same was or is fraudulent and void;

and this defendant, further answering, denies that the said testator, the alledged trustee, in disregard of his alledged trust, which is
279 stated and set forth in complainant's bill of complaint, or in disregard of any trust whatever, or in breach of said alleged trust or of any trust or otherwise, converted the alleged truest moneys or estate or any part thereof to his own use, or that the same or any part thereof became or ever was absorbed in his own business or was at any time or in any manner used or employed therein or that the same materially or at all enhanced the value of his estate.,

And this defendant, further answering, denies that the complainant, upon the death of her husband, in the year 1860, or any other time subsequent thereto, looked to her father, the said Ayers P. Merrill, in her deep affliction or otherwise, as her natural adviser, or that she reposed in him an unquestioned or any greater or other trust than she would have reposed in any relative other than her
280 father; and this defendant alleges the fact to be that ever since the death of complainant's husband the complainant, whether in deep affliction or otherwise, refused to place or repose her trust implicitly in her father, the said Ayres P. Merrill, but, to the contrary, greatly withdrew her trust and confidence from him and did repose her trust and reliance in her relative and friend, Walter Goodman, in respect to her business affairs, and therein until the time of the death of the said Goodwin was in such affairs, and particularly in respect to the alleged trust estate and fund set forth in her bill of complaint, *was* governed, controlled, advised, and directed by the said Walter Goodwin.

And this defendant, further answering, denies that the said Ayres P. Merrill, the said alleged trustee, during his lifetime did
281 not render an account to the complainant of the said alleged trust fund and estate, or that the complainant was or is left in ignorance of what the said Ayres P. Merrill has done with said alleged trust fund or estate; and this defendant alleges and shows to this honorable court that the said Ayres P. Merrill during his lifetime and after the sale and disposition of said alleged trust estate and the conversion thereof into money did fully and particularly, at the request of the complainant, account for the said estate and money and every part thereof, and at the request of the complainant did pay the same and every part thereof, after paying the expenses attending the execution of said trust, over to the said Walter Goodman, to be by him invested for the benefit of the com-
282 plainant, in the State of Mississippi or in an adjoining State, in the purchase of cotton; and this defendant alleges that the complainant well knew at that time and now well knows that the said alleged trust moneys were so accounted for and were so paid over to the said Walter Goodman, and that the same were invested by the said Walter Goodman in the purchase of cotton.

And this defendant, further answering, denies that during the lifetime of the said testator the complainant loaned him a large sum of money or any — of money whatever or placed in his hands in trust for her any sum of money whatever, except that, after the investment of said alleged trust money in cotton as aforesaid, the said

Walter Goodman, as this defendant is informed and believes, repaid to the complainant a certain sum of money on account of
283 said alleged trust fund, which money, amounting to the sum of $1,400.00 and no more, so repaid to complainant or other moneys the said complainant placed in the hands of Ayres P. Merrill, the said testator, to hold or invest on account of the complainant; that thereafter and on or about November the 16th, 1868, the said testator, in order to keep the said moneys so placed in his hands by complainant safely and securely invested, purchased therewith and with other moneys belonging to him for the benefit of the complainant t-o certain bonds of the United States Government, commonly known as and called five-twenty bonds, of the value and for which the said testator paid the sum of $2,210.00, and which said bonds the said testator therefore deposited in the hands and intrusted to the keeping of certain bankers in the city of New York for the use
284 and benefit of the complainant, and that the interest and income thereof was from time to time, as the same accrued and was paid, paid over to the complainant by the testator or upon his order until the said bonds were finally surrendered and given up to the complainant, as hereinafter stated; and the defendant, further answering, alleges and shows that thereafter and during the year 1871, but at what particular time in that year this defendant is unable to state, the aforesaid two United States bonds were, at the request and upon the demand of the complainant, surrendered and given up to the complainant absolutely and taken into her own possession and under her own control, and the same never again came into the hands or possession or under the control of the said Ayres
285 P. Merrill, defendant's testator, nor did the same ever come into the hands, possession, or under the control of this defendant.

And this defendant, further answering the bill of complaint, denies that the said testator, Ayres P. Merrill, ever received from the complainant, directly or indirectly, the said sum of $4,000, or that the said testator ever invested the said sum of $4,000 for or on behalf of the said complainant or any other sum whatever in real estate lying in the city of Memphis, Shelby county, Tennessee, or in any real estate whatever, or that he ever invested any sum of money whatever for the complainant other than the sum of $2,210 hereinbefore mentioned.

And this defendant, further answering, denies that the premises situated in the city of Memphis, Shelby county, Tennessee,
286 which are described in the said bill of complaint as follows: "east part of lots 355 and 356, 35 x 148½ — on Madison street, in said city of Memphis," the same being otherwise known and described as the house and lot numbered 59 on Madison street, in Memphis, Tennessee, being the same formerly occupied by the said Ayres P. Merrill, said testator, in his lifetime as his family residence, was left by the said testator or was, by the last will and testament of the said Ayres P. Merrill, devised or bequ-athed or in anywise affected except by way of confirmation of the conveyance thereof to this defendant made by a deed of conveyance thereof,

which was made and delivered by the said testator to this defendant on or about December 3rd, 1867, bearing date on that day, and which deed, at the time of the execution of the last will and
287 testament of the testator, remained in the possession of this defendant, and which, to the knowledge of the said testator, had not, up to that time, been placed on record.

And this defendant, further answering, denies that it is impossible for the complainant to renounce her alleged claim mentioned in the last will and testament of said testator, as therein provided, or that it is impossible for the complainant to release said alleged trust fund, so far as her claim thereto is concerned, or that the requirement or provision that the complainant should release or renounce all her claim upon the estate of the said testator for moneys accruing from the sale of the said tract of land in Illinois, contained in the first clause or subdivision of the said last
288 will and testament of the said testator, is or was unjust or an unrightious requirement; and this defendant alleges and shows that said requirement or provision in said last will and testament contained, coupled with the devise therein and thereby made for the benefit of the complainant, is in all respects a fair, just, equitable, and right-ous requirement and provision and one which in equity and good conscience ought to be accepted and complied with by the complainant.

And this defendant, further answering, denies that the complainant was at any time with reason *reason* satisfied or that she ever with reason believed that she, the complainant, would be left penniless by the acceptance of the devise made to her by the said Ayers P. Merrill in and by his last will and testament, or that by
289 reason or in consequence of the conditions imposed upon her by her alleged trustee in and by his said will, which conditions the complainant in her bill of complaint wrongfully & regardless of the facts terms "cruel and unlawful conditions," she would be left penniless or without means of support.

And this defendant, further answering, alleges the fact to be that by the acceptance of the devise and provision made for her benefit by the testator by his said will and by renouncing her alleged claim against the testator's estate which is mentioned in said will the complainant would secure, have, and receive a greater yearly income and a greater benefit during his lifetime than she would or could have received from or out of the said alleged trust alleged to
290 have been credited and established for her benefit by the said Dr. William Newton Mercer.

And this defendant, further answering, denies that the said testator was in any manner, to any extent whatever, or at any time induced or influenced by this defendant to commit the acts mentioned in the bill of complaint and therein alleged to be a fraud upon the complainant or any of them or to do or perform any other act, deed, or thing whatever mentioned or set forth in the said bill of complaint; and this defendant, further answering, denies that the life estate devised to the complainant by said testator in and by his said last will and testament is of very small value and

291 this defendant, to the contrary, alleges and shows that the said life estate is of very great value, and that the annual rental value thereof amounts to the sum of at least $1,200, of which, but for her own acts, the complainant might have long since been and now might be in the full and free enjoyment; and this defendant denies that the complainant was at the time of exhibiting her bill of complaint or that she now is without means of support except by reason or in consequence of her rejection of or refusal to accept the said devise made to her by the said testator.

And this defendant, further answering upon her information and belief, denies that this defendant is now or has been at any time by or in consequence of the death of the said Ayres P. Merrill and his will or for any other reason the survivor of the said
292 Ayres P. Merrill as trustee of the said alleged trust estate or trust fund, or that this defendant sustains the relation of trustee to the complainant in respect of the said trust estate or fund or in respect of any fund or estate whatever as the survivor of the said Ayres P. Merrill, deceased, or otherwise; and this defendant denies that she is unfit for the said position of trustee or that her interests are opposed to the interests of the complainant, except so far as that this defendant, having qualified as executrix of the will of the said testator, is interested and she is informed and believes is required by law to carry out and execute the said will of the said testator, and except so far as this defendant is bound to pro-
293 tect herself and the estate of the testator, the father of the complainant, and this defendant against the wrongful charges and attacks of the complainant and against the unjust and wrongful efforts of the complainant to deprive this defendant and the beneficiaries under said will of all benefit and advantage rightfully and equitably conferred by the said testator upon the defendant by the aforesaid conveyance and upon the beneficiaries under said will by the provisions thereof.

And this defendant, further answering, denies that at the time of the death of the said testator he, the said testator, owed to the complainant any money or sum of money whatever upon her claim set forth in her bill of complaint or for or on any account whatever, or that the said testator at the time of his death owed any sum
294 of money whatever unto the said William Newton Mercer Merrill mentioned in said bill of complaint, and, to the contrary thereof, this defendant alleges and shows that all just debts, dues, and demands of whatsoever nature or character existing against the said testator in his lifetime in favor of the complainant or in favor — the said William Newton Mercer Merrill were long before his death paid, settled, satisfied, and discharged by the said testator, and that this defendant is not liable to account to the complainant for any sum of money or for any cause whatever.

And this defendant, further answering, denies that she is insolvent or that she has no means except what she got by the aforesaid will, or that she is unfit for that alleged reason or for any reason whatever to have charge of the real estate devised by said
295 will; and this defendant alleges and shows that she owns and

is possessed in her own right of real estate and property situated in the State of Tennessee other than that devised by her from said testator.

And this defendant, further answering, denies that there is any danger whatever that any just or lawful claim of the complainant against the estate of the said testator will be lost without the intervention of this honorable court for complainant's relief, or that any such danger ever existed.

And this defendant, further answering, denies that any just, rightful, or equitable claim of the complainant against the estate of said testator now amounts to over ten thousand dollars or to any other sum whatever, or that the complainant has any just or
296 lawful claim whatever against the estate of the said testator except under, pursuant to, and in accordance with the provisions of the last will and testament of the said testator for the life estate therein devised and provided uupon the condition therein expressed.

And this defendant, further answering, alleges that the cause and causes of action stated and set forth in the complainant's bill of complaint did not nor did either of them accrue within six years before the commencement of this action.

And this defendant, further answering, alleges that the cause and causes of action stated and set forth in complainant's bill of complaint did not nor did any or either of them accrue within ten years before the commencement of this action.

297 And this defendant, further answering, alleges that she has been informed and believes that on or about the third day of April, 1857, one Dr. William Newton Mercer, by an instrument in writing bearing date on that day, conveyed to Ayres P. Merrill, defendant's testator, a certain tract of land situated in Macoupin county, in the State of Illinois, which is the conveyance and the land on that behalf mentioned in the bill of complaint; that said conveyance was made for the benefit of the complainant and for the uses and purposes in the said deed of conveyance set forth and for no other use or purpose, and this defendant refers to the said deed, the record thereof, or a duly proven copy thereof when the same shall be produced in evidence upon the trial of this action
298 as to the contents of said deed; that the said deed of conveyance conveyed less than 320 acres of land, but the exact number of acres conveyed thereby this defendant is unable to state; that the said tract of land, when so conveyed and when subsequently sold and disposed of by the said testator, was wild, unimproved, uncultivated, and unoccupied, and did not amount in value in the aggregate at the time of the said sale thereof to more than four thousand five hundred dollars, and that no income from said land was ever had or received by the testator.

And this defendant, further answering, alleges that by the terms of said deed of conveyance of said tract of land the same was conveyed, together with all privileges and appurtenances thereunto belonging or in anywise appertaining, to defendant's testator, and to the only proper use, benefit, and behoof of defendant's testator,

299 the said Ayres P. Merrill, his heirs and assigns, forever, with covenant of warranty against the claim or claims of any other person or persons whomsoever claiming by, through, or under him, the said Dr. Wm. Newton Mercer, the grantor of the said deed of conveyance named, as upon the production and examination thereof will more fully and at large appear.

And this defendant, further answering, alleges, upon her information and belief, that by the terms of said deed of conveyance defendant's testator was also fully authorized and empowered, in his discretion, upon the sale of said tract of land, to pay the proceeds thereof and every part thereof unto the complainant for her own use and benefit.

And this defendant, further answering, alleges and shows
300 to this honorable court that, subsequent to the aforesaid conveyance to defendant's testator and two several conveyances, as set forth in the bill of complaint, the said Ayres P. Merrill, defendant's testator, under and pursuant to the power given him by the aforesaid deed of conveyance, sold and conveyed the said tract of land in Macoupin county, Illinois, and realized therefor in gross the sum of four thousand and five hundred dollars (4,500) and no more, and that, after paying and deducting from said proceeds the taxes and other charges and expenses connected therewith and the costs, charges, and expenses attendant upon the sale and conveyance thereof, there remained of said proceeds in the hands of defendant's testator the sum of four thousand two hundred and twenty-seven dollars and no more; and this defendant,
301 further answering, alleges that the aforesaid sale and disposition of said tract of land and conversion thereof into money by defendant's testator was made at the special instance and request of the complainant.

And this defendant, further answering, alleges and shows that immediately upon the said testator collecting and realizing the proceeds of said tract of land so sold as aforesaid the said testator, with the consent of the complainant, at her special instance and request and at her direction, paid the said proceeds and every part thereof, amounting to said sum of $4,227, over to Walter Goodman, a relative of the complainant, and who was then the trusted friend, agent, and adviser of the complainant, to be by him invested
302 in cotton, as herein aforesaid, for the benefit of the complainant; and this defendant alleges, on her information and belief, that the said Walter Goodman did thereupon and at the request of the complainant invest all of said proceeds so coming to his hands in the purchase of cotton for the use and benefit of the complainant; and this defendant alleges, upon her information and belief, that the said cotton so as aforesaid purchased for the use and benefit, of the complainant was afterwards and before the same was sold by the said Walter Goodman burned or otherwise wholly destroyed, and that the said investment was thereby entirely *entirely* lost to complainant.

And this defendant, further answering, alleges that the said testator, said alleged trustee, at the time of the aforesaid pay-

303 ment of the proceeds of said tract of land, the alleged trust estate, and fund into the said Walter Goodman, fully and completely accounted therefor and for all his transactions in relation to said alleged trust estate money and funds into the complainant, who therefore accepted said accounting and the aforesaid payment made by defendant's testator in full discharge of the testator, so far as any claim or demand of the complainant was concerned against him, under the said deed of conveyance made as aforesaid by Dr. William Newton Mer.

And the defendant, further answering upon her information and belief, alleges that the said testator, said alleged trustee, by the aforesaid accounting and payment became and was fully and com-
304 pletely released and discharged from the said alleged trust and from all and every claim and demand which theretofore existed or which thereafter might exist in complainant's favor against him, the said testator, on account of said alleged trust fund and estate.

And this defendant, further answering, alleges that no part of said alleged trust estate funds or moneys was ever returned to or came into the possession or under the control of the said testator, said alleged trustee, unless the hereinbefore-mentioned sum of fourteen hundred dollars or some part thereof, which was as aforesaid placed by complainant in the hands of said testator, was a part thereof.

And this defendant, further answering, alleges that the two — of land and premises situate in the city of Memphis, Shelby county, in the State of Tennessee, whereof the testator died
305 seized, and which were devised by him in his said will, and which together comprise the so-called double tenement house numbered 98 and 100 Madison street, in said city of Memphis, and also the said house and lot situated in the said city of Memphis and known as No. 39 Madison street, in said city of Memphis, which is also mentioned in the will of the testator, which last premises were conveyed to this defendant by the said Ayres P. Merrill on or about the 3d day of December, 1867, by deed bearing date on that day, all of which said three pieces or parcels of real estate are mentioned and described in complainant's bill of complaint, were and each of them was, as the complainant well knows, purchased by the said Ayres P. Merrill, the said testator, and, together with the
306 buildings thereon and the appurtenances, were paid for by him long prior to the 3rd day of April, 1857; that the said lot mentioned and described in the bill of complaint and known as No. 59 Madison street, in the city of Memphis, and which was in said bill of complaint stated to have been and which, as a matter of fact, was conveyed to this defendant by the testator on or about December 3d, 1867, was purchased and paid for, and the house now thereon was erected and paid for by the said testator in or prior to the year 1857, more than six years prior to the creation of the said alleged trust, and about ten years prior to the sale and conversion of the said alleged trust estate into money; and the said double tene-

ment house, consisting of the two tenement houses and the
307 lot or lots on which they stand, numbered 98 and 100 Madison street, Memphis, Tennessee, mentioned and described in the bill of complaint, and which were devised by the will of the said testator, were purchased and paid for by the said testator in or prior to the year 1855, more than two years prior to the creation of said alleged trust and about six years prior to the sale and conversion of the said alleged trust estate into money; and this defendant alleges the fact to be and that the same is well known to the complainant that no part of the said alleged trust estate or fund ever went into, was expended upon, or applied to or towards the payment for or for the improvement of the aforesaid real estate, tenements, or buildings or either of them, and that the said trust estate and moneys
308 never were nor was any part thereof used by the said testator in his own business or for his own purposes, and that the same never in any manner enhanced the value of his estate.

And the defendant, further answering, upon her information and belief, alleges that the value at the — of the death of the testator and at this time of the said double tenement house and premises known as No. 98 and 100 Madison street, in said city of Memphis, which was left and devised by the testator in his will exceeds the sum of thirty thousand dollars, and that the real and actual value of the house and premises devised by the said testator by his will to the complainant is $15,000 and upwards, and that the same exceeds the total alleged claim made by the complainant, as shown by her bill of complaint, against the estate of defendant's
309 testator by the sum of five thousand dollars.

And this defendant, further answering, alleges that at the time of the conversion by the said Ayres P. Merrill, the testator, of the said alleged trust estate into money, and at the time of the conveyance by the said testator to this defendant of the said house and lot known by the number 59 Madison street, in the city of Memphis, Tennessee, the said Ayres P. Merrill was entirely solvent and abundantly able to pay all his just debts and liabilities, of whatsoever nature or character the same might be, and from the time of the said conversion by him into money of the said alleged trust estate thenceforth at all times so continued to be until the time of
310 his death, — was worth and had property of the value of more than thirty thousand dollars ($30,000); that the said testator being in such condition of absolute solvency, as he might well and lawfully do, conveyed the said house and lot known as and by the number 59 Madison street, in the said city of Memphis, Tennessee, to this defendant at or about the time stated in the bill of complaint, by deed dated as in said bill of complaint set forth, which deed of conveyance was rightfully and lawfully accepted by this defendant, and that the said premises so conveyed to and accepted by this defendant are now held, possessed, and owned by this defendant in her individual capacity, free, clear, and discharged of and from all claim thereon made on the part of complainant, under the said will of the testator or otherwise.

311 And this defendant, further answering, denies that the

aforesaid deed of conveyance made by the said Dr. William Newton Mercer to the said testator, Ayres P. Merrill, which is set forth in the bill of complaint, was made with any other interest or for any other purpose than such as in this answer hereinbefore set forth, and as will, upon inspection of the said deed of conveyance, more fully and at large appear.

And this defendant, further answering, alleges, upon her information and belief, that Ayers P. Merrill, the said testator, on or about the 22nd day of June, 1871, having in view the aforesaid loss of said alleged trust fund by the aforesaid investment in cotton, and the probability that the complainant, his daughter, might upon
312 his death be left without adequate means of support and maintenance, and desiring and with the intent to provide for the complainant an income for her life equal to the income which she might have received or been entitled to out of said alleged trust estate or fund, made an- executed his last will and testament, wherein and whereby he devised unto the complainant for her life the aforesaid western portion of the double tenement house purchased of Adloi O. Harris, being the house and lot numbered 98, on Madison street, Memphis, Tennessee, in the bill of complaint mentioned, to be held and used by her, with all the income to be derived therefrom, during her natural life, upon the condition that she, the complainant, renounce all claims upon the estate of the said testator for
313 monies accruing from the sale of a tract of land in Illinois conveyed to the said testator in trust for the benefit of the complainant by Dr. William Newton Mercer, which will more fully and at large appear by reference to said bill; which tract of land and monies is the same tract of land and the same alleged trust monies set — in complainant's bill of complaint; that the reason and purpose hereinabove set forth is the only reason, object, and purpose of the said *advice;* and this defendant further alleges that the complainant has not, except by said last will and testament and under and pursuant to the terms thereof and by the opperation thereof, according to the intent and purport, as therein expressed, any right or title to or interest in the said real estate so devised to her,
314 and that the said devise ought to be taken and excepted by the complainant, as in said will provided, in lieu of all her claim against the estate of the testator for or on account of said alleged trust estate fund and moneys; wherefore this defendant prays this honorable court that the bill of complaint of the complainant may be hence dismissed, and that this defendant may be adjudged to recover her reasonable costs and charges in this action most wrongfully sustained.

MARIA E. STRANGE.

STATE OF NEW YORK, *City and County of New York:*

Maria E. Strange, being sworn, upon her oath deposes and says that she is the defendant above-named in and who subscribed the foregoing answer; that she has heard the said answer read
315 and knows the contents thereof, and that the same is, and that the facts therein stated are true, of her own knowledge,

except as to the matters which are therein stated on her information and belief, and as to those matters she believes it to be true.

MARIA E. STRANGE.

Subscribed and sworn to before me this 19th day of July, 1875, as witness my hand and official seal.

In testimony whereof I have hereunto set my hand and affixed my official seal, at said city of New York, this 19th day of July, A. D. 1875.

[SEAL.] ALEX. OSTRANDER,
Commissioner of Tennessee in New York,
No. 33 Park Row, N. Y. City.

Order Releasing No. 59 Madison Street from Receiver. Ent. Feb'y 14, '76, M. 313, p. 520.

316 ANNA M. CARPENTER.
vs.
MARIA E. STRANGE, Executrix A. P. Merrill. } No. 1805, R. D.

This cause came on this day to be heard upon motion of defendant to discharge that part of the property described in the bill exhibits as No. 59, on the south side of Madison street, Memphis, Tennessee, fronting 35 feet on Madison street and running back south 148½ feet, from the custody and control of the receiver in the cause, & the same having been heard and considered by the court & the court being of opinion that defendant is entitled to the possession of said property, and that the receiver, Julius A. Tayler, ought to be discharged as to that, it is therefore ordered, adjudged, and
317 decreed that said receiver deliver possession of said property to defendant & pay over to her any money that may be now in his hands that he has received as rent therefor, but the discharge of the receiver — in no way to effect attachment of said property.

Amended Answer of M. E. Strange. Filed Feb'y 14th, 1882. R. J. Black C. & M.

Amendment of answer.

In Chancery Court of Shelby County, Tennessee.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix, &c. } 2615, H. D.

The defendant, Mrs. Maria E. Strange, by leave of this court first had and obtained, files this *h*as her amended answer in the above-stated case.

The bill of complaint herein was filed on 15th of January,
318 1875. On 22nd of October, 1875, her original answer was filed. That original answer she now reaffirms. To the best

of her information and belief, its statements are true. When that answer was filed and when the bill of complaint was filed she was living in the city and State of New York. Her father, Dr. A. P. Merrill, had died in 1873, a citizen of the city and State of New York, and she had accompanied his remains from the city of New York, where he died, to see them entered in Elmwood cemetery, near the city of Memphis, where for many years prior to 1864 he had made his home.

Her said father had left a will, of which she was named as executrix, and that will had been probated in New York and letters testamentary had been issued to her. She had been sued in
319 New York as executrix of said will and as personal representative of said Dr. Ayers P. Merrill. She — wholly ignorant of the rules of law and did not know anything of the legal effect or of the territorial operation of the letters testamentary issued to her in New York.

Real estate mentioned in the bill and known as No. 59 Madison street, claiming it as her own under a deed made to her, filed by her father in 1867 and then delivered to her, as well as under a devise contained in said will. An agent residing in Memphis was managing the property for her; and under the power and provisions of said will she was also, through an agent, in the control and management of the other real estate in Memphis which had belonged to said Dr. A. P. Merrill, as described in said bill.
320 When she was informed of the filing of said bill she wrote to Mr. Henry Craft, and old friend of her father and herself, then engaged in the practice of law in Memphis, asking his attention to this case. He sent to her a copy of the bill, and that his suggestion she caused her original answer thereto, filed as aforesaid on the twenty-second of October, 1875, to be prepared in New York, where she then lived. It was sworn to in New York and forwarded to said Craft and, as she is informed, was by said Craft, as her solicitor, filed in this cause.

The bill describes her as executrix and alleges the probate of said Ayres P. Merrill'- will, without specification as to the place of probate or the court in which she had qualified as executrix.
321 In point of fact, the will of Dr. A. P. Merrill had, at that time and until January, 1881, never been probated, except in New York, and no letters testamentary had ever been issued to her, except those issued in New York by the court in which the will was then probated. This is the fact which by this amended answer she desires to add to her original answer and so bring to the knowledge of this court. She avers that neither by the bill or otherwise was her attention in any way called, before she filed her original answer, to the question as to the probate of the will or her qualification as executrix in Tennessee.

She did not know that it was either necessary or proper that the will should be probated and letters issued to her in Tennessee. She is informed by her attorney, Mr. Craft, and believes the fact
322 to be, that he supposed from the allegations of the bill that she was executrix in Tennessee, and knew nothing to the

contrary until so informed in the latter part of 1880 or early in 1881. The fact that she had not been appointed executrix in Tennessee was then made known to him by the solicitor of complainant at the request or suggestion of complainant's solicitor, communicated to respondent by Mr. Craft. She did, early in January, 1881, present the will of A. P. Merrill for probate in the probate court of Shelby county, Tennessee, and procured letters testamentary under it to be issued to her by said court, but until that time she was not executrix in Tennessee. Her original answer was filed under the circumstances thus detailed, and she now seeks to make
323 known in answer to said bill that she was not executrix except in New York, where the bill and the answer were filed. Respondent further shows that on the 2nd day February, 1881, complainant, by the same solicitor who filed the bill herein, exhibited her bill (No. 3912 on the rule docket) in this court, by which she impleads respondent as executrix and personally and the heirs and devisees of said A. P. Merrill in a claim, as she alleges, against the estate of said A. P. Merrill for the same identical trust fund derived from property conveyed by Dr. Mercer, which she claims in this bill.

In her said bill, No. 3912 on the rule docket of this court, she sets out the filing and pending of this bill and the fact that respondent was not executrix in Tennessee when this bill was
324 filed, and suggests that this bill will not be futher prosecuted.

Reference is here now made to said bill No. 3912 as it is on file in this court, and, upon its allegations and suggestions, and upon the face of this amended answer, respondent asks that the bill filed herein be by this court now dismissed.

CRAFT AND COOPER,
For Respondent.

STATE OF TENNESSEE, *Shelby County:*

Before me this day personally appeared Mrs. Maria E. Strange and made oath that the foregoing answer *are* true to the best of her knowledge and belief.

M. E. STRANGE.

Sworn to and subscribed before me this 9th day of January, 1882.
J. L. GALLOWAY, *J. P.*

325 *Order Allowing Amended Answer to be Filed. Ent. Feb. 15th, 1882, M. 34, page 131.*

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix, &c., } No. 2615, H. D.
" 1805, R. D.

In this cause the court orders that respondent, Maria E. Strange, have leave to file the amended answer submitted to the court except the words " and she claims the same benefit and legal effects of that

fact now thus alleged and pleaded that could have resulted from it if pleaded in abatement or set up and relied upon in her original answer," the court holding that the answer cannot be treated as a plea in abatement as of the date of filing the original answer.

Respondent excepts to the disallowance of the above para-
326 graph, but files the answer as charged by this order.

Setting Aside Order of Reference. Ent. Feb'y 17, '82, *M.* 34, *p.* 160.

CARPENTER *vs.* STRANGE. } 1805, R. D.

The order of reference having been inadvertently made in this cause on Nov. 8th, 1881, is, by consent, set aside.

Decree. Ent. June 28th, '82, *M.* 35, *p.* 530.

ANNA M. CARPENTER *vs.* MARIA E. STRANGE, Executrix, &c. } No. 1805, R. D.

ANNA M. CARPENTER *vs.* MARIA E. STRANGE, Executrix, &c. } No. 3912, R. D.

Consolidated causes.

327 These causes were this day heard upon bills, answers, proofs, and interlocutory decrees, when it appeared in No. 3912, R. D., that about the year 1873 Ayres P. Merrill departed this life in the State of New York, of which he was then a citizen; that his will was duly probated there, and that respondent, Maria E. Strange, was sole executrix, & there and — qualified as such, she being also a citizen of said State; that shortly after said qualification complainant, also a citizen then and now of said State, instituted a suit against said executrix for the recovery of money alleged to be due her from her father, said A. P. Merrill, who had held property for her as trustee under a deed of conveyance made for her benefit by William Newton Mercer, which said suit was brought in the supreme court
328 of New York, sitting in and for the county of New York, in said State, and in which suit she is a creditor of said A. P. Merrill, — attached a deed of gift, made in 1867, by which said A. P. Merrill seemed to convey a certain lot or property in Memphis, Tennessee, on the south side of Madison street, known as lot No. 59, and sought to have set aside as fraudulent and void as to said A. P. Merrill'- creditors, of whom she claimed to be one.

It further appeared that said Maria E. Strange, about January, 1881, had propounded a duly certified copy of said will with the probate, &c., made in New York, & after having the same recorded in the probate court of Shelby county, Tennessee, procured letters to
329 be issued to herself recognizing and authorizing her to act as executrix in Tennessee, after which this bill was filed.

Upon the hearing of this bill, when complainant offered to read the record of said cause in said New York court, marked Exhibit B to this bill, counsel for Mrs. Strange and the guardian *ad litem* for the minor defendants objected to the reading of said transcript or judgment upon the ground that neither the executrix in Tennessee nor the heirs or legatees were bound by it, and that it was incompetent and inadmissible as evidence in this cause for the reason that it was not in any way binding upon said respondents in this proceeding, and for the further reason that the said record shows upon its face that the judgment was erroneous and ought not to have been rendered.

330 The court, however, was of the opinion, and so decided, that, under the act of 26th of May, 1790, passed by the Congress of the United States, defining and prescribing what force and effect shall be given to the records, judgments, and decrees of the different States, this judgment roll and transcript is entitled to full faith and credit in this court, and that it is proper and sufficient evidence upon which a recovery and relief may be had in this cause.

And the court, being of opinion upon the whole case that complainant is entitled to recover of said Maria E. Strange, executrix of A. P. Merrill as aforesaid in this State, according to the tenor and effect of said proceedings and judgment, it is now decreed that she do recover the sum of $16,436.70, with interest thereon at the rate

331 of 6 per cent. per annum from the 5th of August, 1880, till this date—*i. e.*, $1,863.91—making $18,300.61, for which let execution issue, to be levied of the goods and chattels, lands and tenements, of said Merrill in the hands of said executrix to be administered.

The court is of opinion that the statutes of limitation set up and relied upon by the executrix and the legatees are no valid defenses against this recovery, holding and decreeing that no statute of limitation began to run against creditors in this case until the qualification of the executrix in this State, in January, 1881.

The court further holds and decrees that the filing of this bill was an election by complainant to renounce all benefit under the will of said Merrill, and she is barred and precluded from ever claiming anything under its provisions.

332 It is ordered that a trustee be appointed to receive and control $6,200 of this recovery when realized, according to the terms of the deed of settlement made by said William Newton Merrill for the benefit of complainant, a copy of which is in this record, and the balance of the recovery is her own individual property and should be paid to her or her attorneys of record as collected.

It is further ordered that this branch of the cause be referred to the master to take proof and report—

1st. What assets have come or should have come to the hands of said executrix in this State.

2nd. What debts due and owing to the creditors of said Merrill, deceased.

3rd. What realty belongs to said estate, and upon what terms should a sale be made.

333 4th. What debts of said Merrill have been paid in this State.

Upon the third inquiry above directed either party may submit proof showing to whom lot No. 59, on south side of Madison street, Memphis, may belong, inasmuch as it is shown in the record from New York, as well as statements in the answer, that complainant's claim had its inception anterior to Merrill's deed to Mrs. Strange, and also that the deed was voluntary. The court refuses to set aside said deed by force of the judgment or decree in the New York court above referred to, holding that the order of that court declaring it void merely is inoperative in this cause.

The question as to whether it is void as to complainant and other creditors of A. P. Merrill is reserved, the court only decreeing
334 now that the said act of Congress of 1790 does not apply so as to give said New York decree the effect of annulling and rendering said deed void for the purposes of this suit.

The question of the validity of this deed and all other questions not adjudged, including costs, are reserved for further action.

Defendants, upon the hearing of this cause, read in evidence the record of this court, 1805, R. D.

From so much of the foregoing decree as awards a recovery to plaintiff against the estate of said Merrill and orders a settlement of the accounts of his personal representative with a view to show an exhaustion of the personalty and to obtain a sale of the realty the defendant, Maria E. Strange, individually and in her repre-
335 sentative capacity, and the other defendants, the heirs and devisees of said Merrill, pray an appeal to the supreme court of the State, to be held at Jackson, on the first Monday of April next, which is allowed upon their giving, satisfactory to the clerk and master, bond for cost in the penalty of two hundred and fifty dollars and conditioned according to law within 30 days from this date.

In No. 1805, R. D., the court is of opinion that complainant's bill should be dismissed, and it is hereby dismissed, at complainant's cost, for which let execution issue against complainant and the surety on the cost bond.

Whereupon complainant prayed an appeal from so much of the foregoing decree in 3912, R. D., as refuses to declare the deed
336 of A. P. Merrill to Mrs. Strange void by force of the judgment and decree rendered in the supreme court of New York, a copy of which is exhibited with the bill to the supreme court, &c.

And she also prayed an appeal from the decree dismissing No. 1805.

Which appeals are granted upon her giving a proper cost bond, and she may have 30 days within which to give said bond.

Appeal Bond. Filed July 15th, 1882. *R. J. Black, C. & M.*

We, S. P. Walker, guardian *ad litem* for Fannie Mitchell and Lydia E. Creighton, and Maria E. Strange, executrix, and individ-

ually, Ayres A. Strange and Alice Mitchell, as S. J. Strange, appellants, and surety, Henry Craft and L. W. Humes, acknowledge ourselves indebted to Anna M. Carpenter in the sum of two hun-
337 dred and fifty dollars, to be void if the said S. P. Walker, guardian *ad litem*, and others above named as appellants, who have prayed for and obtained an appeal from a decree of the chancery court of Shelby county in a cause in which Anna M. Carpenter — complainant and Marie E. Strange *et al.* — defendants to the next term of the supreme court of Tennessee for the district of West Tennessee, to be held at Jackson, Madison county, on the first Monday in April next, shall pay all such costs as shall be awarded against them by said supreme court.

This 30th day of June, 1882.

S. P. WALKER. *Guardian ad Litem.* [SEAL.]
MARIA E. STRANGE, *Ex'trix,* [SEAL.]
MARIE E. STRANGE, [SEAL.]
AYERS A. STRANGE, [SEAL.]
By HENRY CRAFT, *Sol.*
ALICE MITCHELL, [SEAL.]
338 By HENRY CRAFT.
HENRY CRAFT, *Surety.*
L. W. HUMES, *Surety.*

Appeal Bond. Filed July 27th, 1882. *R. J. Black, C. & M.*

We, Anna M. Carpenter, appellant, and surety, R. D. Frayser, acknowledge ourselves indebted to Maria E. Strange, ex't'x, *et al.*, appellees, in the sum of two hundred and fifty dollars, to be void if the said Anna M. Carpenter and others above named as appellants, who have prayed for and obtained an appeal from a decree of the chancery court of Shelby county in a cause in which Anna M. Carpenter — complainant and Maria E. Strange, ex't'x, *et al.* are defendants to the next term of the supreme court of Tennessee for the district of West Tennessee, to be held at Jackson, Madison
339 county, on the first Monday in April next, shall pay all such costs as shall be awarded against her by said supreme court.

This 27th day of July, 1882.

ANNA M. CARPENTER, [SEAL.]
By R. DUDLEY FRAYSER, *Att'y.*
R. DUDLEY FRAYSER. [SEAL.]

STATE OF TENNESSEE, } ss:
Shelby County, }

I, Robert J. Black, clerk and master of the chancery court of Shelby county, do hereby certify that the foregoing 320 pages comprise a full, true, and perfect transcript of all the proceedings had in a certain cause lately pending herein, wherein Anna M. Carpenter is complainant and Maria E. Strange *et al.* are defendants, as the same appear of record and on file in my office (2 causes).

340 & 341 In witness whereof I hereunto set my hand and affix the seal of said court, at office, in Memphis, this the 30th day of December, A. D. 1882.

[Seal Chancery Court of Shelby County.]

R. J. BLACK, *C. & M.*,

342 *Report of the Referees. Filed April* 12, '84.

Statement of facts of the case.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Ex'r'x, &c., *et al.* } No. 917.

From shelby chancery docket.

Dr. Ayres P. Merrill, the father of the complainant and of the defendant, Maria E. Strange, formerly resided in Memphis, Tennessee, and subsequently in the State of New York, where he died in 1873, leaving there some personal estate of inconsiderable amount and considerable real estate in Memphis, Tenn.

343 In 1871 Dr. A. P. Merrill executed his last will and testament, in New York, of which he appointed def't, Maria E. Strange, sole executrix.

Mrs. Strange proved this will in New York and qualified there as executrix in Feb'y, 1874, and subsequently, in Jan'y, 1881, proved the same will in Tennessee, Shelby county, where she also qualified as executrix and where she now resides.

In 1857 Dr. Wm. Newton Mercer conveyed certain lands in Illinois to Dr. Merrill, in trust for complainant, to the sole and separate use and benefit of the complainant and the heirs of her body, free from the debts, control, liabilities, and contracts of any husband she may have, with power in the trustee to sell and convey and to reinvest the proceeds in other real or personal property in like man-

344 ner and with like trusts, limitations, and restrictions, and in the event the compl't, Anna M., dying leaving no surviving issue the property so conveyed in trust or the proceeds thereof to descend to W. N. M. Merrill, a brother of compl't, Anna M., and be held by said trustee, A. P. Merrill, on the same conditions and trusts as above stated, with power to the trustee to appoint his successor by will or by such conveyance as he in his discretion may deem best and expedient.

The trustee, A. P. Merrill, sold and conveyed these lands thus conveyed in 1861 and 1864 for $6,200.00, but never reinvested the proceeds.

345 He received $3,000 for the land so sold in 1861 and $3,200.00 for the land sold in 1864, and has never accounted to said Anna M. or any one for her for said sum of $6,200 and interest.

The complainant claims that the trustee, A. P. Merrill, has never accounted to her for the proceeds and brought suit against the def't,

Mrs. Strange, as his executrix in the supreme court of the State of New York to recover these trust moneys *de bonis testatoris.*

In this suit the plaintiff alleged that Dr. Merrill, about six years before his death, executed a deed of certain real estate in Memphis, lot 59, Madison street, to Mrs. Strange, but that this deed was without any valuabl- consideration and was never recorded, and
346 in fact never delivered, and if delivered was, under the laws of Tennessee, void as against creditors, and therefore void as against the claim of plaintiff, said Anna M.

The main defense to this suit consisted in a denial that Dr. A. P. Merrill owed the plaintiff the moneys in question and in allegations claiming *the* that the deed was properly executed and delivered and was valid. Upon the hearing of this cause by the supreme court of the State of New York the court adjudged that the plaintiff should recover of the defendant ex'r'x *de bonis testatoris* the sum of $16,436.70, and that the deed referre- to was void as to her claim, and gave judgment accordingly.

The deed of gift from Dr. A. P. Merrill to def't, Mrs.
347 Strange, was made in 1867 and was without consideration, and he was indebted to complainant at that time. This deed was not recorded until after his death, in 1873.

By his will Dr. Merrill left to Mrs. Strange the same lot or parcel of land conveyed in the deed to her. The real estate of the testator in Memphis, including this lot 59 claimed by Mrs. Strange under the deed, was, by the agent of Dr. Merrill, rented, and after the death of Dr. Merrill and the qualification of Mrs. Strange as his ex'r'x she collected these rents from this agent and received and receipted to this agent as executrix for them.

348 Both complainant and def't, Mrs. Strange, resided in New York from 1867 to about 1880 or 1881.

By his will in the 1st item Dr. Merrill gives to complainant Anna a life estate in the house and lot No. 98 on Madison street, in Memphis, upon condition that she renounced all claim upon his estate for moneys accruing from the sale of the trust lands in Illinois, and upon her declining this condition then this lot to be sold for the benefit of the daughters then surviving of his several daughters.

By the 2nd item he gives lot No. 59 on Madison street (same lot conveyed in the deed) to Mrs. Strange; also all his personal property.

By the 3rd item he gives in trust to Mrs. Strange $1,000 to
349 each of his four granddaughters and $100 to his grandson, W. B. Mitchell, Jr., — some money to be employed and invested at the discretion of the trustee, Mrs. Strange.

By the 5th clause he appoints Mrs. Strange executrix without bond, and requests that she give the watch presented to him by Dr. Mercer to his son Mercer, his own watch to Ayres A. Strange, his mosaic casket to Sazie Strange, and his signet to Alice Moore Mitchell.

In January, 1875, the complainant filed her attachment bill in the chancery court at Memphis against Mrs. Strange, as the ex'r'x of A. P. Merrill, seeking to collect said trust fund due her from

the estate of Dr. Merrill and to have the will of Dr. Merrill
350 reformed and the condition imposed in regard to the bequest stricken out of said will, and that she recover said legacy free from said conditions, and that she recover judgment for the amount due her.

This bill was answered by the def't, and no objection to the jurisdiction of the court or subject-matter or person, or that the will had not been probated in Tennessee, and that she had not qualified as ex'r'x in Tenn. was raised. This bill, it is claimed, was in aid of the N. Y. suit. This case slumbered.

When, on the 2nd of Feb'y, 1881, complainant filed the present bill in the chancery court at Memphis against Mrs. Strange,
351 as the ex'r'x of Dr. A. P. Merrill, deceased, and the heirs and distributees and legatees under said will. The bill is filed by complainant as a general creditor's bill to wind up the estate of Dr. A. P. Merrill in Tenn. as an insolvent estate, alleging the suggestion of insolvency, &c., and alleging the necessary jurisdictional facts. The bill alleges that the complainant, Anna M. Carpenter, is a creditor of said estate and sues to recover on the New York judgment the said sum of $16,436.70 and int. on same, and to have a trustee appointed to take charge of the original trust fund, $6,200, &c., and to wind up the estate of Dr. Merrill as an insolvent estate, and have the realty sold to pay the debts, &c.; to have the
352 lot 59 sold, which is claimed by Mrs. Strange under the deed, charging in the bill said deed is void and without consideration, and that same was held in the suit in N. Y. as void as to her claim, &c.

W. N. M. Merrill is the only person who filed a claim against the estate, and his claim is similar to the complainant for trust property sold by the trustee, Dr. Merrill, and never accounted for, and he has no judgment on his claim.

These two causes were consolidated and heard together. A duly authenticated — of the record and proceedings and judgment in the supreme court of New York of Anna M. Carpenter *vs.* Maria E. Strange, ex'r'x, *et al.* is filed and produced as evidence, both
353 as to the debt and nullity of the deed, &c.

Upon final hearing the chancellor held it conclusive as to the debt, but not as to the deed, and held that compl't was entitled to recover the $16,436.70 and int., making $18,639.91, and that a trustee would be appointed to hold and manage the original trust fund, $6,200.00.

The chancellor held that the filing of the last bill was an election not — take the legacy, but to sue for the trust fund, &c., and dismissed the bill filed in 1875.

The chancellor ordered a reference—

1st. What assets have come or should have come to the hands of said executrix in this State.

2nd. What debts are due and owing to the creditors of said
354 estate of A. P. Merrill, dec'd.

3rd. What realty to said estate and upon what terms should a sale be made.

4th. What debts of Merrill have been paid in this State.

"Upon the third inquiry above directed the court ordered that either party might submit proof showing to whom lot 59 on Madison street may belong, inasmuch as it is shown in the record from N. Y., as well as statements in the —, that complainant's debt against Merrill had its inception anterior to Merrill's deed to Mrs. Strange, and also that the deed was voluntary."

The def'ts set up the defense of the statute of limitation
355 of 6 years & 7 years & 2 years & 3 years, and that by filing of the bill in 1875 compl't is estopped to claim a judgment for the trust funds, and that they do not owe the debt, and that the deed from Merrill to Mrs. Strange is a valid deed, and that the decree in N. Y. is inoperative to set aside said deed.

The executrix has made no settlement in N. Y. or in Tenn. The heirs and distributees and legatees of Dr. A. P. Merrill are correctly set out and they are all before the court. Def'ts read on trial bill No. 1805, filed in 1875.

From so much of the decree as awards a recovery of compl't and orders a settlement of the accounts of his personal representatives with a view to — sale of realty, def'ts appealed to the
356 supreme court, and the compl't appeals from the decree dismissing the bill filed in 1875, and from decree refusing to declare the deed void under N. Y. judgment.

The law of the case is as follows:

The statute of limitations set up by the defendants do not apply to this case under the facts. The statute did not run during Merrill's lifetime; he was an express trustee. The suit was commenced in New York in 1875 or 1876, and amended complaint in 1878, 19th March, and final judgment in 1880, and this bill filed in 1881. There was no proving the will and qualification in
357 Tennessee until Jan'y, 1881.

The seven years' statute begins to run from the recovery of the judgment, and a recovery of a judgment against the personal representative by suit commenced in time will save the bar of the statute of seven years (Code, sec. 2281, 2786) as to the realty as well as personalty, provided the proceedings to subject the realty are instituted within seven years from the recovery of such judgment.

The general statute of limitations applicable to real actions, Code, sec. 2763, is no defense to this bill. Woolrige *vs.* Page, 1 Lea, 135 & 143; Henry *vs.* Mills, 1 Lea, 144.

And we hold that the same rule applies to foreign as well as domestic judgments.

358 The complainant has by her bill elected to sue for the claim or trust fund due her and not to accept the bequest with its conditions, and claims nothing under the will.

And there is nothing in her bill filed in 1875 under the facts of the case to estop her from relying on and claiming under the New York judgment.

The complainant has made her demand and has commenced her suit in time and has prosecuted same without delay or laches, but has been resisted in every way by the defendant.

As to the validity and legal effect of the judgment rendered in New York, both as to the debt and the decreeing the deed to
359 Mrs. Strange, and the right of complainant to recover on said judgment, and the binding force of same, and its conclusiveness in this case in Tennessee—as to the law on these questions we adopt and report as the law the law as contained in the printed brief hereto attached (which is as follows, — clerk):

Argument and Law.

By the Constitution of the United States, art. IV, and the act of Congress of 1790 passed in pursuance thereof, the solution of this question depends on the laws of the State of New York, since this act provides that the judgments of the courts of the different States of the Union shall have the same effect in the other States as they have in the State in which they were rendered.

360 This court, therefore, in deciding this question, is restricted to the simple inquiry, What was the effect of this judgment in the courts of the State of New York? Was it conclusive upon the parties, or were they at liberty to litigate the same matters over again in those courts in order to obtain, if possible, a new and different judgment? If Mrs. Carpenter, not satisfied with this judgment, should again sue Mrs. Strange in New York in order to obtain a larger sum, and Mrs. Strange should plead this judgment as conclusive, it is too obvious to admit of argument that the courts in New York would hold it conclusive.

361 On the other hand, if in any suit or proceeding in *in* the courts of New York between Mrs. Strange, ex'r'x, as plaintiff, and Mrs. Carpenter, as def't, the question of the existance and the amount of this debt should arise, it is equally obvious that this matter could not be drawn into controversy, but that it was settled forever by their former judgment.

In a proceeding in Tenn., however, to subject the real estate to the payment of debts, a judgment against the ex'r is not conclusive upon the heirs. It is open to any defense which the ex'r might have made. No defense to this judgment is, however, made.

Whether Mrs. Carpenter or Mrs. Strange attempts, either as
362 plaintiff or as defendant, to raise this question anew all the elements of *res adjudicata* exist and constitute a complete estoppel. The parties are the same, the subject-matter is the same, the issue is the same, and the object the same.

Such is the effect which this judgment would have in New York. By the Constitution of the United States and by the very terms of the act of 1790 passed in pursuance thereof it is entitled to the same effect here in Tennessee. The question is answered. 6th Baxter, 376; 2d Heisk., 304.

This is the obvious, simple, natural view of the case, and must prevail, notwithstanding the ingenious endeavors of the learned counsel for the defendant to liken it to the case of different adminis-
363 trators appointed and acting under the laws of different States.

I do not intend to overlook the claim of the counsel that the parties in New York and the parties in Tennessee are not identical, are not in privity with each other, and that the subject-matter is not the same, for this is the substance of their claim whether it is so formulated or not. Neither do I intend to overlook the cases from Howard cited by the learned counsel. The cases are cases of different adm'rs in different jurisdictions, each deriving his authority from the ordinary in the jurisdiction where he is to administer the assets of the decedent in such jurisdiction, distinct trustees of different assets, bearing no relation to the decedent and deriving
364 no title or authority from him, but mere officers or agents of the ordinary, between whom there is no relation and no privity. Each is independent of the other.

If sued by a creditor because he does not perform his trust by applying the assets of the decedent in his hands to the payment of a debt of the decedent, and such creditor produces a judgment recovered by him against another administrator in another jurisdiction as conclusive of the debt, he may well reply, I have nothing to do with your other administrator or with the judgments against him. I have a right to decide for myself, upon my own responsibility, how I shall decide my trust, and whether or not I shall apply
365 these assets confided to me to be administered or to the satisfaction or not, and, if you are not satisfied with my decision, bring your suit against me and obtain, if you can, a judgment against me. It is my right to defend, notwithstanding what has passed between you and the other administrator, with whom I have no concern.

All the cases cited by the defendants' counsel are cases of such administrators and bear no analogy and have no application to this case.

The case of an executor, the same executor of the same will, is entirely different. No case can be found in which it has been held that a judgment against such an executor establishing a debt
366 against his testator is not conclusive evidence of the debt in every jurisdiction in which such executor may qualify. The natural person is the same—the official capacity; or, in other words, the legal person is the same. The right and authority of the executor is derived from the will, not from the ordinary. His probate of the will and his qualifying himself as executor are not the sources, but the evidences, of his title and authority. By force of the will it is his duty to execute it in every jurisdiction where the testator has estate, and his title to such estate, wherever situated, becomes vested in him at the decease of the testator, and no ordinary in any State can, by the appointment of an administrator, divest himself of his authority or title to estate of his testator,
367 wherever situated, except for his own neglect and default.

The fact that the execution of the will in different jurisdictions is governed by the law of the jurisdiction where the property is situated makes no difference. Every judgment rendered in one State, even against a natural person, when sought to be enforced in another State, must be enforced according to the laws of such State.

Mrs. Strange as Mrs. Strange is the same person in Tennessee that she was in New York. Mrs. Strange as executrix of the last will and testament of Dr. Ayers P. Merrill is the same executrix of the same will and testament in Tennessee that she was in New
368 York. Mrs. Strange as ex'tr'x was sued in New York for a debt of her testator. She appeared, litigated the claim, with every opportunity to defend and every privilege which the law allowed. Judgment *de bonis testatoris* was rendered against her. It became her duty to apply the *bona testatoris* in every jurisdiction, wherever situated, to the payment of such judgment according to the laws of such jurisdiction. What reason is there why she should be permitted to litigate the claim anew in as many different jurisdictions as her testator left estate-? What reason can be shown why the *bona testatoris* in Tennessee should not be applied to the satisfaction of this judgment rendered in New York?

369 The provisions of the Constitution of the United States and the act of Congress passed to carry them unto effect are most salutary in their results, both to the public and to individuals, and should be applied in every case to which they are applicable.

I think that the considerations which I have suggested leave no doubt that they are applicable to the case before the court. The reasoning of the court in the case of Lightfoot *vs.* Bechly, 2 Rawle Rep., 431, strongly sustains the view which I have taken. Judge Story in his Conflict of Laws, § 522, citing this case, observ-s that "there is no privity between an administrator in one State and another person administrator in another State."

370 It may be different if the same person were administrator in two different States.

Thus far my observations have had reference to the general question of the effect of the judgment in New York, in that State, and its consequent effect in Tennessee.

Permit me now to advert to a few considerations regarding the effect of the judgment in New York as to the nul-ity of the deed which the court below held not to be conclusive.

If the question as to this deed were a question of title to land purely, I should be disposed to acquiesce in the view taken by
371 the court below. A naked question of title, in whatever form the action may be brought, partakes so much of the nature of a real action, depending so entirely on local laws and usages, that no court can properly give effect to a judgment in a personal action to try title rendered in another State. Title is a matter so entirely local in its nature that the jurisdiction to try it is also local and confined to the courts of the State where the land is situated.

But where the object of the suit is not to try title to real estate, but to enforce some trust, or to cansel some fraudulent claim respecting it, subjects of which courts of equity usually take cog-
372 nizance, in such cases the judgment is held to have the same effect in the jurisdiction where the estate is situated as in the State where it is rendered, and to be as conclusive as any other personal judgment.

The true doctrine on this subject is laid down by Chief Justice Marshall, in pronouncing the opinion of the Supreme Court of the United States in Massie *vs.* Watts, 6 Cranch, 158.

"But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of a contract or as trustee, or as the holder of a legal title by any species of *mala fides* practiced on the plaintiff, the principles of equity gives a court jurisdiction wherever the person may be
373 found, and the circumstance that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case may depend, does not seem sufficient to arrest the jurisdiction." Judge Marshall cites Penn *vs.* Lord Baltimore, 1 Ves., 444; Anglesea *vs.* Muschamp, 4 Vernon, 75; Earle of Kildare *vs.* Sir Maurice Eustice and Fitzgerald, 2 Vernon, 494; Toller *vs.* Carterret, 2 Vernon, and says:

Miller *vs.* Birdsong, 7th Bax., 531.

"Upon the authority of these cases and others which are to be found in the books, this Court is of the opinion that in a case of fraud, trust, or of contract the jurisdiction of a court of chancery is sustainable wherever the person be found, although
374 lands not within the jurisdiction of the court may be affected by the decree."

This doctrine is well settled in Tennessee.

The supreme court of Iowa in McGregor *vs.* McGregor, 9 Iowa, Rep., 78, held to the same effect. The court say:

"A judgment of a court of equity having jurisdiction of the person in regard to land lying in another State will be held valid and binding in the State where the lands are situated."

The opinion is very full. The court cites the authorities cited by Chief Justice Marshall, and also 2 Story Eq. Jur., 744, 745; Story Conflict of Laws, 544–'5; Sturtevant *vs.* Pike, 1 Carter Ind. Rep., 277; Story Eq. Pl., 489; McLean *vs.* Lafayette Bank, 3 McLean, 622.

The opinion in the 6th of Cranch is still the law of the
375 Supreme Court of the United States, the tribunal which has the ultimate jurisdiction of this question, arising as it does under the Constitution and laws of the United States.

The question as to this deed cannot be distinguished from the question in the 6th of Cranch. It is not a question of title at all, but a question of the equity of the defendant to hold this land as against the claim of the plaintiff. The court in New York had complete jurisdiction of the subject as a court of equity, and the decree of a court of equity in New York is conclusive in Tennessee. Peak *vs.* Ligon, administrator, 10 Yerger, 469, cited and approved in 5th Cald., page 279, and 6 Hump., 163; see also 2 Lea.

376 I submit to the court that the judgment of the court below as to this deed cannot be sustained, either upon principle or authority.

The chancellor was in error in holding that the decree of the court in New York was erroneous and inoperative, in holding that the deed to Mrs. Strange was void as to the claim of the complainant.

That decree is binding on Mrs. Strange, and the chancellor should have so decreed, and should have decreed that the deed was void as to complainant's debt, and the land therein conveyed should be held liable and subjected to the payment of her debt.

377 The decree of the chancellor was erroneous on that point. The bill filed in 1875 should not have been dismissed, except without prejudice to complainant, and the dismissal should not hold or operate to her prejudice in any way or effect her rights under the present bill, and every right that may have accrued to her under that bill should be preserved to her. The causes were consolidated and heard together and should stand together.

With these modifications, the decree of the chancellor should be affirmed and the cause remanded for further proceedings, and the accounts taken and the estate wound up and administered as an insolvent estate, and upon exhaustion of the personalty the lands should be sold to pay the debts.

378 The defendants should pay the costs of the supreme court and the costs of the court below—paid out of the assets of the estate or proceeds of the lands when sold.

A. D. BRIGHT.
D. L. SNODGRASS.
E. L. GARDENHIRE.

379 *Exceptions to Report of the Commission of Referees.*

ANNA M. CARPENTER.
vs.
MARIA E. STRANGE *et al.*
} #917, Shelby Chancery Docket.

We except to the finding as part of the law of this case on pp. 16 and 17 of the report in these words:

"The seven years statute begins to run from the recovery of the judgment and a recovery of a judgment against the personal representative by suit commenced in time will save the bar of the statute of seven years (Code, sec-. 2281, 2786), as to the realty as well as personalty, provided the proceedings to subject the realty are instituted within seven years from the recovery of said judgment. The general statute of limitations applicable to real actions—Code,

380 sec. 2763—is no defense to this bill."

Woolridge *vs.* Page, 1st Lea, 135 & 143.
Henry *vs.* Mills, 1st Lea, 144.

And we hold that the same rule applies to foreign as well as domestic judgments."

We except to the finding as part of the law contained in the paragraph of the report immediately following that quoted above, in the words following:

"The complainant has by her bill elected to sue for the claim or trust fund due her and not to except the bequest with its conditions, and claims nothing under the will.

And there is nothing in her bill filed in 1875 under the facts of the case to estop her from relying on and claiming under the New York judgments.

381 The complainant has made her demand and has commenced her suit in time, and has prosecuted same without delay or laches, but has been resisted in every way by the defendant."

We except to the finding as part of the law or the case as contained in all that portion of the report which follows the paragraph last above quoted and extends to the end of the report, embracing the printed brief adopted as part of the report.

We except to the said portion of said finding by the referees in all its legal aspects and bearings, and especially as it relates to the admissibility, the competency, and the effect as evidence of the New York judgment for any purpose for which it is offered or used. We except to the admission of that judgment as evidence, either

382 *prima facie* or conclusive, against the executrix and against the heirs.

And we except to all that part and portion thereof which relates to the validity of the deed made in 1867 by A. P. Merrill to Maria E. Strange for the real estate known as number 59 Madison street, Memphis, Tennessee.

We except to the finding of the referees that the decree of the chancellor should be modified, and to there finding that said decree as so modified should be affirmed.

We submit and insist that the referees should have found as the law of the case that the chancellor's decree should be affirmed in its ruling as to the nullity of the New York judgment upon the question of the validity of the deed of A. P. Merrill, made in 1867,

383 to Maria E. Strange for No. 59 Madison street, and that said decree should be reversed in all other respects.

We claim that the record of the New York judgment is inadmissible upon its face, because—

1st. It begins with an amended complaint, and thus shows that it is not a complete record.

2nd. Upon its face the amount of the judgment is excessive, being for more than $16,000 upon a debt of $3,000, with interest since 1862, and $3,200 with interest since 1864, and the court will know judicially that the interest could not swell the debt at the date of the judgment to such an amount; such an error, at least, would be subject to correction. As appears from record, p. 146, this result was allowed by compounding the interest every six months.

384 3rd. It is the judgment of a New York court against an executor qualified in New York, and not competent evidence against either executrix, or as in this State especially, as it does not show any execution or *nulla bona* return or other reason for not making the money in New York.

And we claim that the referees should have found that the statute of limitation of six years is a bar to this suit in favor of the executrix, and that the statutes of six and seven years made a complete defense to the heirs.

We except to the finding as matter of fact on pp. 11 & 12 of the report, in these words:

"A duly authenticated copy of the record and proceedings and judgment in the supreme court of New York of Anna M. Carpenter against Maria E. Strange, executrix, *et al.* is filed and pro-
385 duced as evidence, both as to the debt and the nullity of the deed, and we claim and insist that the finding as to this should have been that the exemplification of the record offered is upon its face incomplete and therefore insufficient, and that the same is not duly authenticated.

We except to the finding of fact because it does not include a finding that there is an- was no personal estate in Tennessee.

The bill filed in Memphis in 1875, we insist, was no bill in the sense of a suit to prevent the bar of a statute, and we except to the finding that the chancellor erred in dismissing that bill.

HENRY CRAFT,
Sol. for Def'ts.
S. P. WALKER,
Guardian ad Litem.

386 Filed April 25th, 1884.

Brief in Support of Exceptions to the Report of Referees.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.* } #917, Shelby Chancery Docket.

I.

The cases cited by the referees as to the effect of the 7 years statute or "dead man's law" do not apply in this case. The referees say: "And we hold that the same rule applies to foreign as well as domestic judgments," without citation of authority. We submit
387 that the only cases which have ever held that a judgment in one jurisdiction against an executor will bind an executor of the same will in another jurisdiction were upon the ground of privity of estate. The executor represents personalty, and wherever this doctrine has been held the executor against whom the foreign judgment has been sustained has had personalty in his hands. 13 Howard U. S., 462 & 470. In both of these cases it will be seen that the instructions approved by the court contain the two elements of exhaustion of the estate (*nulla bona* return) in the State in which the judgments were recovered, and ample personal assets in the hands of the executor sued to pay the debts sued for. It will also be seen, too, that they proceeded upon the doctrine of "privity of estate" between the executors in different jurisdictions, stating
388 broadly and strongly that if it were a question of administrators instead of executors the law would be different, as held in Stacy *vs.* Thacker, 6 How., 44.

In the printed argument adopted by the referees as part of the report and on page 5 thereof this language is used: "The right and

authority of the executor is derived from the will, not from the ordinary. His probate of the will and his qualification himself as executor are not the sources, but the evidences, of his title and authority.

This is the doctrine upon which the cases in 13 Howard are based, but such is not Tennessee law.

Ott *vs.* Smith, 3 Baxter, 138.
Killebrew *vs.* Murphy, 3 Heisk., 551.
Fay *vs.* Reaper, 2 Sneed, 203.

In Tenn., then, the distinction made by Sup. C't U. S. between executors and administrators does not obtain, and this law of
389 Stacy *vs.* Thacker would prevail.

The only answer to the plea of the statute of six years and of seven years is the suit in New York. That there is no privity, and therefore that the New York suit cannot avail, we cite, further, Story Conflict of Laws (7th ed.), sec. 529*b*, 529*c*, 529*d*, 522.

As to the heirs the judgment *vs.* the adm'r "can have no effect whatever in establishing the validity of the claims."

Davis *vs.* Reaves, 7 Lea, 599, & *ib.*, 472.
Inglo *vs.* Jones, 9 Wall., 486.
Deucale *v.* Archer, 8 Peters, 526.

The lapse of seven years cuts off the right of the creditor as against the heir.

Bomar *v.* Hagher, 7 Lea, 89, & *ib.*, 472.

This suit is upon the judgment alone. If the judgment is not conclusive no suit could be maintained now on the original cause of action.

390 McLean *et al. vs.* Meek, 18 How. (U. S.), 16.

In adopting the brief of counsel as the law of the case the referees adopt, we suppose, the declaration that this is a question of Federal law & for the final decision of the Sup. C't U. S.

II.

By her complaint in N. Y. and also by her bill filed in Memphis in 1875 complainant claims both as creditor and under the will, claiming this under the will, though with the disclaimer accompanying that claim we insist she has claimed under the will and cannot claim against it.

Swanson & Gray *vs.* Tarkington, 7th Heis., 612.

That by claiming the devise under the will she has elected not to claim the trust fund, and that the record shows no case whatever for the revocation of that election.

III.

391 By adopting the brief of counsel as the law *pro tanto* of the case, the referees' force and — of our exceptions, we consider

mainly, under this exception, the finding that the chancellor erred as to the action of the N. Y. court in annulling the deed of 1867 to Mrs. Strange for No. 59 Madison St.

a. The N. Y. proceeding was against Mrs. Strange in her representative capacity merely; therefore, as to this matter, that court had no jurisdiction of the person of the grantee in that deed, and none, of course, to adjudicate about it.

b. The real estate being in Tennessee, the N. Y. court could exercise no jurisdiction in reference to it, except by a decree *in personam.* It could not, even if Mrs. Strange had been a defendant personally, have done more than compel her to recovery. It had no jurisdiction, therefore, of the subject-matter for the rendi-
392 tion of a decree declaring the deed void and subjecting the property to debts.

c. In N. Y. only judgment creditors can file bill to set aside fraudulent conveyances.

Mohawk B'k *v.* Ahveter, 2 Paige, 54.
Cupper *vs.* Hudson, 13 N. Y., 161.
Reuben *vs.* Jail, *ib.*, 488.

This court will take judicial notice of the case of New York.
Coffee *vs.* Neely, 2 Hies., 304.

And then (upon above authorities), as here, want of other property to satisfy debt must be shown. On the face of the complaint filed in N. Y. is an allegation that the deceased owed no other debt and left an estate worth more than $100,000; no jurisdiction, therefore, of complainant or of her case. A judg't may be attacked when record shows want of jurisdictional facts.

Galpin *vs.* Page, 18 Wallace, 350.

393 *d.* The judgment against fraudulent grantor or his personal representative does not preclude the grantee for showing that the grantor did not owe the debt when the deed was made.
Mattingly *vs.* Nye, 8 Wallace, 370.

On the general question of jurisdiction over the property & the parties:

Watkins *vs.* Holman, 16 Peters, 25.
Wilkinson *vs.* Leland, 2 Peters, 627.

In this last case Judge Story says (p. 655): "The legislative and judicial authority of New Hampshire were bounded by the authority of that State, and could not be rightfully exercised to pass estates lying in another State."

Lord Baltimore's case, 2 Lea Ca. Eq., 7, 1806.

The cases cited in the printed brief, made part of the report, fully sustain the view that, as to property in another State, a court can exert no power, except *in personam*, and in 10 Yer., 469, it is
394 expressly held *held* that when the foreign court had ordered the conveyance to be made and the order had not been

obeyed the title does not pass by force of the decree. 6 Hum., 163, cited by referees, does not touch the question, nor, as to this point, cite the 10 Yer. case, and in 5 Cald., 297, the 10 Yer. case is cited in support of the very doctrine invoked.

It is too clear, we submit, for argument that the question as to this deed was a question of title, and that 6 Cranch case is authority for us. 7 Heis., 531, cited by the referees, is directly to the point that as to realty in another State the courts of this State can exercise no jurisdiction, except *in personam* and by coercing a conveyance.

If the N. Y. court might have coerced Mrs. Strange to convey it did not undertake to do so. The decree it did make is a nullity.

395 "The court had no inherent power by the mere force of its decree to annul a deed or to establish a title." P. 155; Hart *vs.* Sanson, 110 U. S. 151; see also Phelps *vs.* McDonald, 99 U. S. "When the property is beyond the local jurisdiction of the court and the defendant is before it the court can compel him to convey as it may direct," &c. 2 Wall, 249; Miller *vs.* Budsong, 7 Baxter, 531.

IV.

The N. Y. judgment, for reasons already assigned, was inadmissible. It has no sufficient certificate of authentication. It is not a record in form, having no caption; on its face it is incomplete.

V.

The bill filed in 1875 was a nullity. Compl't was a citizen of N. Y. and so *was* defendants. It was an attempt to attach
396 under sub-sec. 7 of attachment law. Merchant *vs.* Preston, 1 Lea. 280–284.

Henry Craft, sol. for def'ts; S. P. Walker, guardian *ad litem*.

The New York judgment is open to inquiry as to jurisdiction, &c. Tuley *vs.* Taylor, 6 Bax., 381; Coffee *vs.* Neely, 2 Heise., 304.

397 THE STATE OF TENNESSEE:

Pleas before the supreme court of said State for the western division thereof, at Jackson, at the April term, A. D. 1887.

Present: The Hon. Peter Turney, chief justice, and D. L. Snodgrass, H. H. Lurton, W. C. Caldwell, and W. C. Folkes, associate judges, when the following proceedings were had, to wit:

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.* } # 917, Shelby Chancery Docket.

SATURDAY, —— 16*th*, 1887.

This cause was heard upon the transcript of the record of the chancery court of Shelby county, the report of the commission of referees, and exceptions thereto, and it appearing to the court that

the transcript of the record from the supreme court of New
398 York is incomplete, and it further appearing that said supreme court of New York had no jurisdiction to pronounce the deed from A. P. Merrill to Maria E. Strange void, it is decreed that the exceptions to the report of the referees upon said two points are well taken, and the same are allowed.

It is therefore ordered, adjudged, and decreed that said report be set aside and the decree of the court below reversed.

But the court being of opinion that complainant in equity is entitled to the premises devised her by the will of said A. P. Merrill, and in accordance with the terms thereof with the rents and profits of the same from the death of said Merrill, it is so ordered, and this cause is remanded to the chancery court of Shelby county for an account of said rents and profits and for further proceedings in accordance herewith.

399 Defendants, Marie E. Strange, executrix, *et al.*, will recover of complainant, Anna M. Carpenter, and R. D. Frayser, surety on her appeal bond, the costs of this court, for which let execution issue.

Decree Setting Aside Foregoing Decree.

ANNA M. CARPENTER
v.
MARIA E. STRANGE *et al.* } 917, Shelby Chancery Docket.

WEDNESDAY, *April 20th*, 1887.

On motion of defendants herein, and after due notice to the solicitors for complainants, the decree herein entered on the 16th day of April, 1887, is vacated, annulled, and set aside, and the following decree is entered in lieu and stead thereof, viz:

400 This cause came on to be heard on the transcript of the record from the chancery court of Shelby county and the exceptions to the report of the commission of referees, and the same having been argued by the respective counsel of the appellants and appellees the court is of opinion as follows, viz:

I. That the record of the proceedings in the courts of the State of New York filed and offered in evidence by the complainant, Anna M. Carpenter, is fatally incomplete and defective, in that the transcript of the record of said proceedings commences with an amended complaint and because the certificate is insufficient.

II. That aside from the objection that the record of said proceedings in the courts of the State of New York is fatally defective as aforesaid and looking solely to the merits of said proceed-
401 ings and judgment as presented in said transcript the said court of the State of New York had no power or jurisdiction to adjudge that the conveyance by the testator, A. P. Merrill, to defendant, Maria E. Strange, was fraudulent and void as to the creditors of said A. P. Merrill, and in no event did said court have power by force or virtue of its judgments or decree alone to divest, remove, or annul the claim of title under said conveyance by defendant, Maria E. Strange.

III. That upon the pleadings, proceedings, and evidence as the same appear in the transcript of this cause the complainant has elected to claim, assert, and sue for a life estate under the decree of the same to her in the first item of the will of said A. P. Merrill in and to the property described in said will as "the western
402 portion of the double tenement purchased of Adlai O. Harris, being the house and lot No. 98, on Madison street, Memphis, Tennessee;" and that by the terms of said will said devise to complainant was made upon condition that said complainant should renounce and surrender the claim against the estate of said testator for which she sues in these proceedings, and that complainant, having thus elected to claim and assert title as devisee under said will, must give effect to and perform the condition upon which said devise to her was made, and must renounce and surrender her said claim against the testator's estate.

Complainant, therefore, is entitled to recover a life estate in the premises as aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the
403 record.

IV. The several questions arising upon the record touching the alleged bar of the statute of limitations, the force and effect of the money judgment rendered in the court of New York in favor of complainant and against defendant, Maria E. Strange, as executrix of said will, and whether said judgment, if duly authenticated and admitted in evidence, would be conclusive or of *prima facie* force only against the executrix of the same will in Tennessee, and the further question whether said judgment in New York against the executrix there qualified would be of any force, either *prima facie* or conclusive, as against the heirs or devisees of the realty in Tennessee, or whether the said proceedings in New York would, as against said heirs or devisees, operate to arrest the run-
404 ning of the statutes of limitations of this State, the court does not deem it necessary here to pronounce any opinion.

It is therefore ordered, adjudged, and decreed that complainant recover of the defendants possession of the premises heretofore described and devised to her under the first item of the will of said Merrill to be held and enjoyed by her as life tenant thereof under said will; and it appearing from the record that said premises are in the possession of a receiver appointed by the court below in this cause, the said receiver is ordered and directed to deliver possession of said premises and of any existing lease or rent obligations in respect thereto to complainant, Anna M. Carpenter.

405 It is further ordered and decreed that this cause be, and it is hereby, remanded to the chancery court of Shelby county, with directions to cause the accounts of said receiver to be finally settled and to turn over to complainant the net rents and income of said premises devised to her as aforesaid from the date of the appointment of said receiver until the delivery of possession as aforesaid. The complainant being entitled to the net rents of said premises from the date of the testator's death, an account of the same will be taken in the court below, and any liability on account thereof

will be enforced in that court by appropriate personal judgment or judgments, and said court will by appropriate decree dispose of the rents in the hands of said receiver produced by property of the testator other than that devised as aforesaid to complainant.

406 The costs of the court below will be paid by the defendants primarily out of any net funds in the hands of said receiver to them belonging, and if not so paid execution may issue therefor. The costs of this court, including the transcript of the record herein, will be paid by complainant primarily out of the fund in the hands of the receiver decreed to her as aforesaid, and if not so paid execution may issue therefor.

Order Refusing Petition to Rehear.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.*
} # 917, Shelby Chancery Docket.

TUESDAY, *May 3rd*, 1887.

This cause was heard upon the petition to rehear, and the court, being satisfied with the decree heretofore pronounced in this
406½ case at a former day of the term, dismisses said petition.

407 In the Supreme Court of Tennessee.

ANN M. CARPENTER
v.
MARIA E. STRANGE *et al.*
} 917.

1. Complainant respectfully petitions your honors for a rehearing in this cause, and in support of said petition would state that the opinion of the court was based on the propositions that the transcript of the record from New York is incomplete, in that it commenced with an amended complaint, and that the said transcript was improperly certified.

2. That Mrs. Carpenter, the complainant, had elected to sue for the life estate devised her under the will of her father, Dr. Merrill.

1 *Proposition.*

We submit to your honors that, though the transcript of
408 the record from New York does commence with an amended complaint, no objection was taken to it in the trial court on that ground, nor was any pleading filed in said court raising this question, and the first intimation that this objection would be urged to it was made in the supreme court. This was too late. The record of the judgment in New York in the trial court was alone objected to on the ground that, being against Mrs. Strange, executrix in New York,— was not competent evidence against Mrs. Strange, executrix of the same will qualified in Tennessee.

Further, as to the authentication of said New York record, it is confidently submitted to the court that it is authenticated as prescribed.

409 Act of Congress 26 May, 1790.

The Code of Tennessee (T. & S.), section 3795, provides: "A judicial record of a sister State or of any of the Federal courts of the United States may be proved by a copy thereof, attested by the clerk under his seal of office, if he have one, together with a certificate of a judge, chief justice, or presiding magistrate, that the attestation is in due form of law." T. & S. Code, sec. 3795.

"The authentication is good under the statute.

"If the judgement of another State has the effect of record evidence in the courts of the State from which it is certified it will have the same effect in the courts of any other State."

Mills *v.* Duryee, 7 Cranch, 483.

Leland *v.* Wilkinson, 6 Pet., 317.

410 2 *Proposition—Election.*

The facts as disclosed by the record show that in 1874 complainant commenced her suit in the supreme court of New York against Mrs. Strange, executrix in New York of the will of Dr. A. S. Merrill; that in her complaint she primarily sought to recover for a trust fund in the hands of Dr. Merrill at the time of his death, and, secondarily, to have the court declare certain conditions attached to a devise to her under the will of Dr. Merrill void.

This secondary object of the suit was abandoned during the progress of the case, and the same proceeded to judgement in favor of Mrs. Carpenter for the trust fund. This was plainly an elec-
411 tion to proceed in New York for the trust fund, and it only remains for your honors to inquire if by this proceeding she has made a re-election. Immediately upon the recovery of the judgement in New York she files her bill in this cause seeking to enforce her New York judgement, the fruits of her election thereto proceed for the trust fund. This state of facts appearing on the record shows an intention and acts in keeping with said intention to rely upon the money demand.

The court will not construe the doctrine of election except to the end that equity may be done.

Pomeroy Equity Jurisprudence, sec. 532, *et seq.*

412 The court is earnestly petitioned to allow a rehearing of this cause, especially as these two propositions were the only ones passed upon, so far as the judgement of the New York court for money is concerned.

FRAYSER AND SCRUGGS,
Sol's for Petitioner.

413 STATE OF TENNESSEE:

I, John W. Buford, clerk of the supreme court of said State for the western division thereof, do certify that the foregoing is a true, perfect, and complete copy of the record, to wit, # 917, in the case of Anna M. Carpenter *vs.* Maria E. Strange *et al.*, from the Shelby chancery docket, and also the orders, judgment, & opinions and the

report of the commission of referees & report & exceptions & brief & petition to rehear, which comprises a full, true, and perfect transcript of the case as appears of record and now on file in my office.

In testimony whereof I have hereunto set my hand and
414 affixed the seal of the court, at office, in the city of Jackson, on this the 3d day of October, 1887, and of the Independance of the United States the 112th year.

[Supreme Court of Tennessee, Western Division, Jackson, Tenn.]

JOHN W. BUFORD, *Clerk.*

In the Supreme Court, at Jackson, Tenn.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE *et al.* } No. —.

Received of R. Dudley Frayser seventy-five and $\frac{50}{100}$ dollars, being in full of transcript fee and express charges in sending transcript to Supreme Court of U. S. in the above-entitled cause.

This 5th day of October, 1887.

$75.50. JNO. W. BUFORD, *Cl'k.*

Endorsed on cover: Tennessee supreme court. No. 1267. Anna M. Carpenter, plaintiff in error, *vs.* Maria E. Strange, individually and as executrix of A. P. Merrill, deceased; A. P. Strange, Alice M. Mitchell, Jane Sarah Strange, *et al.* Filed October 20, 1887.

Office Supreme Court U. S.
FILED.
DEC 19 1887
JAMES H. McKENNEY.
CLERK.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

A. M. CARPENTER
vs.
M. E. STRANGE, *Executrix, et al.* } **No. 1,267.**

Motion to Dismiss or Affirm.

W. HALLETT PHILLIPS,
For Defendants in Error.

R. O. POLKINHORN, PRINTER.

Supreme Court of the United States.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

A. M. CARPENTER
vs.
M. E. STRANGE, *Executrix, et al.* } No. 1,267.

Motion to Dismiss or Affirm.

The court is moved to dismiss the writ of error or to affirm the decree, on the following grounds:

1. This court is without jurisdiction under sec. 709 of the Revised Statutes.

2. If any question cognizable under that section was in fact decided, such decision was not necessary, and the decree rendered, is supportable on grounds which this court has no jurisdiction to review.

W. HALLETT PHILLIPS,
For Defendants in Error.

The above motion will be submitted three weeks from service of copy of same and accompanying brief.

Statement.

The writ of error in this cause, was sued out to reverse a decree, rendered by the Supreme Court of Tennessee.

The plaintiff in error, brought her suit number 3912 in the Chancery Court of Shelby County, Tennessee, against the defendant in error Mrs. Strange the executrix of A. P. Merrill, and the distributees and legatees under his will.

In this she sought to have the realty sold to pay the debts of the estate. She claimed as a creditor by virtue of a judgment recovered by her in the Supreme Court of New York against the defendant, Mrs. Strange, as executrix.

Appended to the bill is the will of the testator, Merrill.

Clause one is as follows:

"I will and bequeath to my daughter, Anna Mercer, (the complainant), the western portion of the double tenement purchased of Addie O. Harris, being the house and lot numbered ninety-eight (98) on Madison street, in Memphis, Tennessee, to be held and used by her, with all the income derived therefrom, during her natural life, but upon condition that she renounce all claim upon my estate for monies accruing from the sale of a tract of land in Illinois, conveyed to me in trust for her benefit by Dr. W. N. Mercer, a considerable portion of which monies were lost by depreciation during the late war, and the balance paid over to the late Walter Goodman, then her trusted friend and agent, to be invested for her benefit in Mississippi." R., 7.

Notwithstanding this provision in the will, the complainant, after the death of her father, brought

the suit, in New York, against her sister, Mrs. Strange, his executrix, claiming to be a creditor of the estate, by reason of the trust mentioned in the will.

In that suit she says—

"She has not renounced said claim as required to do, nor has she refused to renounce said claim for the reason that plaintiff claims that, by virtue of the deed of trust, it is impossible for plaintiff to release said trust funds, and for the further reason that such a condition is against conscience and justice." R., 12.

One of her prayers is,—

"That this Court may decree thrt the bequest of said life estate be taken and held free from all and every condition; that the said condition be decreed as void, and that the title to the life estate be absolutely vested in this plaintiff, and that she be released from renouncing any claim for said trust money." R., 14.

There was a money judgment rendered in 1880 by the New York court in favor of the complainant, to be satisfied out of the estate in the hands of the executrix, and the judgment also undertook to declare void, as against complainant's claim, a deed of a certain piece of real estate made by the testator to Mrs. Strange in his lifetime. R., 44.

In 1875, previous to her recovery of judgment in New York, the complainant filed an attachment bill number 1805, in the Chancery Court at Memphis, Tennessee, against Mrs. Strange, as the executrix of Merrill, in which she sought to recover for the same demand as that involved in the New York suit.

In this bill she makes precisely the same allegation regarding the provision in the will under which the devise is made to her, as that made in the New York suit. And, as in that suit, she prays that the bequest of the life estate be taken and held by complainant free from every condition. R. 62, 63.

This suit was consolidated with number 3912, and both causes were heard together. R. 59.

The Chancery Court held that the complainant was entitled to recover as a creditor of the testator, against Mrs. Strange, as executrix, the amount of the New York judgment.

It further held that the filing of this bill (presumably in No. 3912) was an election by complainant to renounce all benefit under the will of her father. It refused, however, to set aside the deed to Mrs. Strange, as adjudged by the New York Court. R. 88, 89.

Both complainant and defendant appealed to the Supreme Court of Tennessee.

There the case was heard in the first instance by the Commission of Referees.

That tribunal affirmed the decree below in so far as it was in favor of complainant. It reversed it in so far as it refused to set aside in accordance with the New York judgment, the deed made by the testator to Mrs. Strange.

It also held —

"That the complainant has, by her bill, elected to sue for the claims or trust fund due her, and not to accept the bequest with its conditions, and claim nothing under the will, and there is nothing in her bill filed in 1875, under the facts in the case to es-

top her from relying on and claiming under the New York judgment." R. 94.

Various exceptions were filed, by the defendants, to this report. Among other grounds of exception was one to the ruling on the question of election. R. 99.

In support of this exception it was maintained —

"That by her complaint in New York, and also by her bill filed in Memphis in 1875, complainant claims both as creditor and under the will. Claiming this under the will, though with the disclaimer accompanying that claim, we insist that she has claimed under the will and cannot claim against it. *Swanson* v. *Tarkington*, 7 Heis. 612; that by claiming the devise under the will she has elected not to claim the trust fund, and that the record shows no case whatever for the revocation of that election." R., 102.

On hearing, by the Supreme Court of Tennessee, this exception was sustained and that court decreed:

"III. Upon the pleadings, proceedings and evidence, as the same appears in the transcript of this cause, the complainant has elected to claim, assert, and sue for a life estate under the decree of the same to her, in the first item of the will of said A. P. Merrill, in and to the property described in said will as "the western portion of the double tenement purchased of Addie O. Harris, being the house and lot, No. 98, on Madison street, Memphis, Tennessee;" and that, by the terms of said will, said devise to complainant was made upon condition that said complainant should renounce and surrender the claim against the estate of said testator, for which she sues in these proceedings, and that complainant having thus

elected to claim and assert title as divisee under said will, must give effect to and perform the condition upon which said devise to her was made, and must renounce and surrender her said claim against the testator's estate.

Complainant, therefore, is entitled to recover a life estate in the premises aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the record.

IV. The several questions arising upon the record touching the alleged bar of the Statute of Limitations, the force and effect of the money judgment, rendered in the Court of New York in favor of complainant and against defendant, Maria E. Strange, as executrix of said will, and whether said judgment if duly authenticated and admitted in evidence, would be conclusive or of *prima facie* force only against the executrix of the same in Tennessee; and the further question, whether said judgment in New York against the executrix there qualified would be of any force, either *prima facie* or conclusive, as against the heirs and devisees of the realty in Tennessee, or whether the said proceedings in New York would, as against said heirs and devisees, operate to arrest the running of the Statute of Limitations of this State, the Court does not deem it necessary here to pronounce any opinion."

It was, in addition, held, that the record of the proceedings in the courts of New York, offered in evidence, was fatally incomplete and defective, and moreover, that Court did not possess the jurisdiction to decree that the conveyance by the testator to Mrs. Strange was void as to his creditors. R., 105, 106.

It was to reverse this decree, that the complainant sued out the present writ of error.

Argument.

From the statement, it is manifest that no Federal question was necessarily involved in the case or determined by the Supreme Court of Tennessee.

The writ of error does not state any such question.

We presume it will be contended, however, that resort must be had to the opinion, and in it that court passes upon the jurisdiction of the New York court to render the judgment establishing the claim of complainant, and in addition, that court also passed upon the question as to the certification of the record of the judgment.

It may be contended that these questions are federal in their nature.

A sufficient answer to this is, that their decision was not necessary to the judgment.

When the court held that the complainant was estopped by claiming under the will from claiming as a creditor under the judgment, this disposed of the case, and rendered it immaterial whether the New York judgment was valid, or whether the records of the proceeding were defective and improperly authenticated.

The claim of the complainant as a creditor against the estate grew out of the trust held in her favor by the testator in his lifetime. All that was effected by the New York proceeding was simply to reduce that claim to judgment.

The decision that the complainant was bound by her election in accepting the benefits of the will from claiming as creditor, is one this court cannot review, and it is a ground sufficient to support the judgment. It was not necessary for the court to have gone any

further or decided a Federal question, and the fact that it may have done so furnishes no reason for the exercise of the revisory jurisdiction of this court.

Moore vs. *Mississippi*, 21 Wall, 638.

The decree of the court would have been necessarily the same if the New York judgment had been valid and the authentication correct.

As was said in *Citizens' Bank* vs. *Board of Liquidation*, "under these circumstances, if we should take jurisdiction we would be compelled to affirm the judgment, whether we found any error in respect to questions arising under the other defenses or not. This defense is complete in itself, and sufficient to support the judgment we are asked to review." 98 U. S., 140.

See also *Kennebec Railroad* vs. *Portland Railroad*, 14 Wall, 25; *Adams County* vs. *Burlington R. R. Co.*, 112 U. S., 127.

But if the court should be of opinion that the decision of the Federal question was necessary, as it was in *Murdock* vs. *Memphis*, 20 Wall, 590, the result would be that the decree must be affirmed under the rule there laid down:

"If it (the judgment) was erroneously decided against plaintiff in error, then this court must further inquire whether there is any other matter or issue adjudged by the State court which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue."

The ruling of the court below to the effect that complainant was estopped from claiming as a creditor, by reason of her acceptance of the provisions of the will, is, beyond doubt, sufficiently broad to maintain the decree.

These considerations, we submit, are sufficient to call for a dismissal of the writ of error or an affirmance of the decree.

Should the court deem it necessary to inquire into the question of the jurisdiction of the New York court and the authentication of the record, they will find that question very conclusively argued in favor of defendants, in the brief of Mr. Craft, Record, 102–104. That argument fully justifies the expression of opinion of the court below on the question.

W. HALLETT PHILLIPS,
For Defendants in Error.

In the Supreme Court of the United States.

CARPENTER
vs.
STRANGE *et al.*
No. 1267.

Reply of W. Hallett Phillips to Briefs Opposing Motion to Dismiss or Affirm.

It is not denied that the decision of the Supreme Court of Tennessee, on the subject of election, is sufficiently broad to dispose of the case.

It is alleged, however, that this question is a federal one because necessarily passed upon in the New York suit.

Therefore, it is argued, the decision sought to be reviewed failed, in this particular, to give effect to the New York judgment.

An inspection of the New York proceedings shows, it is true, that the present plaintiff in error sought to avail herself of the benefit of the devise freed from the condition attached thereto. She also sought a money judgment against the estate of Merrill. The defendant urged that the plaintiff must take the devise with its condition.

The New York court did not undertake to decide the question of the devise, but simply gave judgment for the money demand.

It is entirely immaterial, however, whether the point was or was not involved in the New York judgment, for, as we have shown, the plaintiff in error had, previous to that judgment, filed her attachment bill, No. 1805, in the Tennessee Chancery Court, in which she sought to enforce the devise without its condition.

Before this suit was disposed of, she filed her other bill in the Tennessee Chancery Court to obtain satisfaction of her claim by a sale of the real estate. This bill was filed subsequent to the New York judgment, and was in part for the purpose of enforcing that judgment. By consent of all parties it was consolidated with No. 1805, and both bills were heard together. R., 59.

How, then, can it be alleged that the Tennessee court was without jurisdiction to decide the question of election which the plaintiff in error herself was there asserting?

Whatever might have been the New York judgment, there was nothing to prevent the plaintiff in error from electing in the Tennessee court to accept the devise. This she did, but in addition sought to get rid of the condition attached thereto.

It is said that bill No. 1805, was dismissed by the Chancery Court, and therefore its allegations should not have been considered as evidence of election.

The record shows that from this decree the plaintiff in error herself appealed to the Supreme Court of Tennessee. R. 89.

Also, that one of the grounds of appeal by the defendant in error, was the failure of the Chancery Court to hold the plaintiff in error to her election. R. 102.

A greater part of the opposing argument, is an attempt to show, that the Supreme Court of Tennessee committed error in deciding "that upon the pleadings and evidence, as the same appear in the transcript of this ca use," the plaintiff had elected to claim under the will of Merrill.

It is contended that, in point of fact, no election was shown.

In answer, it is sufficient to say, that this court is without jurisdiction to inquire whether the decision of the State Court on this question was right or wrong.

Under oft repeated decisions, the inquiry is limited to the ascertainment of whether the ruling is sufficiently broad to support the judgment.

If the examination could extend further there would be no difficulty in supporting the correctness of the ruling. A party cannot accept the benefit of a devise such as that made by Merrill, and at the same time reject its burden.

W. HALLETT PHILLIPS,
For Motion.

JAN 7 1880

Supreme Court of the United States

In Error to the

SUPREME COURT OF TENNESSEE.

ANNA M. CARPENTER
vs.
MARIA E. STRANGE, Executrix, et al. } No. 1,267

MOTION TO DISMISS OR AFFIRM.

FRANCIS FELLOWES,
Of Counsel for Plaintiff in Error.

The Case, Lockwood & Brainard Co. Print, Hartford, Conn.



ARGUMENT

OF FRANCIS FELLOWES

Of Counsel for Plaintiff in Error.

This motion, may it please your Honors, is made upon the assumption that you have no jurisdiction to revise the doings of the Supreme Court of Tennessee.

The jurisdiction depends upon the question, whether or not the Supreme Court of Tennessee decided federal questions adversely to the plaintiff; and upon the further question, whether or not there appears upon the record any question, not federal, which was decided by the court, and was sufficient to uphold the judgment, even if the federal questions had been decided in her favor.

The record shows that federal questions of the highest importance were involved in the case; questions arising under the constitution and laws of the United States, of vital moment to their citizens, and binding upon the courts of every State in the Union. The record shows that the plaintiff commenced an action against the defendant, as executrix in the Supreme Court of the State of New York, by personal service on the defendant, in which the defendant appeared and answered the complaint. According to the allegations of the complaint the defendant's decedent, Dr. Ayres P. Merrill, in his lifetime, was indebted to the plaintiff for certain trust-moneys belonging to her, which he had converted to his own use, whereby he became indebted to the plaintiff for their amount; and further, that the decedent had conveyed to the defendant certain real estate in Tennessee, whereby he was rendered incapable, without such estate, of discharging his indebtedness.

The plaintiff further alleged in her complaint, that the decedent, in his will, devised to her a life estate in a house in Tennessee, upon the condition that she would renounce all claim to the before-named trust-moneys; that she had *not* renounced such claim, nor had refused to renounce it, upon the ground that another party was interested in the trust-money; and for the further reason that the condition was against conscience and justice.

The plaintiff therefore prayed for a judgment against the defendant as executrix:

I. For the trust-moneys to be paid *de bonis testatoris*;

II. For a judgment declaring that the condition annexed to such devise be declared void, and that the title to said house be vested in her, free from said condition;

III. That the deed of the decedent to the defendant, before named, should be declared void as against the claims of the plaintiff.

To this complaint the defendant, Mrs. Strange, answered fully, either denying, or avoiding, or pleading satisfaction of, all the claims of the plaintiff. She denied the trust; alleged that the trust-moneys had been paid over to the plaintiff or to her agents; set up a counter-claim, alleged the validity of the deed of Dr. Merrill to herself; and as to the devise to plaintiff of the life-estate in the house, alleged that said devise, with its conditions, ought to be taken and accepted by the plaintiff as a full satisfaction of all her claims against the estate of defendant's testator; and that there was no obstacle, either in law or equity, to a renunciation by the plaintiff of all her claims against such estate; and further, that the decedent was solvent and had sufficient property to pay all his debts, aside from the estate conveyed by him to her.

The defendant further, in her answer, set up in bar of the plaintiff's claims the statutes of limitation.

Thus the parties were at issue before a court of competent jurisdiction, upon each and all of the matters in controversy between them, as shown by the records in this case, both of

the courts of New York and Tennessee. All these matters were decided by the court in New York, and are an end of all controversy between the parties, both in the courts of that State, in the courts of Tennessee, and in the courts of every State in the Union.

It must not be overlooked that at the time when said complaint was filed and served, Mrs. Strange resided in the city of New York, had caused the will of Dr. Merrill to be proved there, had qualified there as executrix of said will, and was acting as such; and that the plaintiff was also a resident of the city of New York; so that there can be no question that the Supreme Court of New York, by which the judgment was rendered, had complete jurisdiction over the parties, and over the subject matter, except perhaps as to the deed made by Dr. Merrill to Mrs. Strange, which the complainant seeks to set aside, and even as to this deed, the question, whether the New York Court had jurisdiction to declare it void, is a Federal question to be decided by this Court.

See Massie *vs.* Watts, 6 Cranch, 158.

Thus every matter of controversy between the parties was settled by the judgment of the Supreme Court of New York, and could never be again called in question.

It was settled—I. That Mrs. Carpenter should have judgment against the estate of the decedent, and of the executrix as such, for the sum of $16,436.70.

II. That the deed of conveyance by Dr. Merrill to Mrs. Strange was absolutely null and void, so far as it affected the indebtedness of the estate to Mrs. Carpenter.

III. That any bequest or devise in Dr. Merrill's will, in favor of any person or persons whatever, was subject to the payment of the judgment.

It will be observed that Mrs. Carpenter, in her New York complaint, made the same allegations as to the devise to her and its condition, and the same prayer, as are contained in

her bills of complaint in the Chancery Court of Tennessee; and that the defendant, Mrs. Strange, in her answer, alleged the same devise and its condition, as a bar to the complainant's action, and prayed that the same might be adjudged a full satisfaction of all claims and demands which Mrs. Carpenter had against Dr. Merrill, or against the defendant as his executrix, and that Mrs. Carpenter should be required to execute a full release of such claims. Record, p. 31.

The matter of this devise, as a satisfaction of the claims of Mrs. Carpenter, adjudged by the Supreme Court of Tennessee in their final decree to be such satisfaction, was clearly in the issue between the parties in the proceedings in New York; and it was decided by the New York court that such devise was not a satisfaction of the claims of the plaintiff, notwithstanding she set up title to it as an absolute devise, free from any condition such as the testator imposed upon her. It is manifest, therefore, that if the Supreme Court of Tennessee had given full faith and credit to the judgment in New York, as required to do by the Constitution and laws of the United States, they never could have inserted in their decree, as a non-Federal question, that the plaintiff had elected to accept this devise as a satisfaction of her claims.

When therefore the New York record was presented to the courts of Tennessee, there were no questions of right open between the parties, except such as related to the assets wherewith to satisfy the claims of the plaintiff. The bill, which the Supreme Court of Tennessee finally decided, was in the nature of an action upon the judgment, filed for the purpose of enforcing the judgment by applying the assets of the testator to the satisfaction of the recovery obtained in New York.

By the New York record, the question whether or not Mrs. Carpenter's prayer that the devise should be decreed to her as absolute, free from the condition attached to it, was within the issue; and even if not decided in terms, was decided in fact, and became *res adjudicata*, since every mat-

ter within an issue, is deemed to be decided, whether specifically named in the decision or not. The prayer was not granted, it was therefore in legal effect denied. Mrs. Strange's prayer also, that Mrs. Carpenter should be required to accept the devise, with the condition, in satisfaction of her claim for trust money, was not granted. It was, therefore, in legal effect denied. By the very terms of the judgment, also, that the plaintiff recover the amount of the trust-moneys, the question of this devise and of the plaintiff's action in respect to it, as a bar to recovery, was forever settled, and when the record of this judgment was presented to the Court of Tennessee, it had no jurisdiction to decree that the plaintiff had elected to accept the devise as a satisfaction of her debt. The only question was whether full faith and credit should be given to that record and judgment, in obedience to the constitution and laws of the United States. This was a Federal question purely, and not a question by the decision of which the Supreme Court of Tennessee could evade the jurisdiction of your Honors, to revise their doings on this writ of error.

I do not overlook the decision of the Tennessee Court, that the record of the New York judgment is incomplete, and not duly authenticated. This question arises under the constitution and laws of the United States, and is a purely Federal question, to be decided by this Honorable Court. It would be premature to argue it here, on this motion to dismiss, where the only question is whether or not your Honors have jurisdiction to revise the judgment of the Supreme Court of Tennessee. I may, however, be allowed to say, that the act of the Supreme Court of Tennessee in raising and deciding such question, was not warranted by anything upon the record, since it does not appear that any objection was made to the introduction in evidence of this record upon the ground that it was incomplete or not duly authenticated; but on the contrary, it necessarily appears from the tenor of the proceedings, as certified to your Honors, that this record was received without objection, the only con-

tention being as to its force and effect. This, as I have said, was a purely Federal question, and one which it was not competent for the honorable judges in Tennessee to plead in bar of the jurisdiction of the Supreme Court of the United States. When this cause comes on for trial before your Honors, upon this writ of error, your Honors will see how futile is this attempt to evade the force and effect of the judgment of the Supreme Court of New York, upon which the plaintiff's rights all stand.

It appears by the record of the proceedings in Tennessee, that the Chancery Court decreed that the plaintiff should recover of the defendant the sum of $18,300.61 for her trust-moneys, with interest, according to the tenor and effect of the proceedings and judgment of the Supreme Court of New York. The statutes of limitation, set up by the defendant, constituted no valid defense. The Chancery Court further decreed that the filing of the bill was an election by complainant to renounce all benefit under the will of Dr. Merrill. It will be observed that the plaintiff, in the bill, upon which this decree was rendered, alleges that the devise of the house to her, in her father's will contained, was made upon condition that she should renounce all claim upon his estate for trust-moneys; and that she has not renounced such claim, nor refused to renounce it, for the reason that she is advised, that by virtue of the deed of trust, it is impossible for her to release said trust-funds, and that such a condition is unjust and a most unrighteous requirement. The plaintiff prays that the devise of the life-estate in said house be taken and held by her free from all and every condition in said will; that the condition be decreed void, and that she be relieved from renouncing any claim to said trust-money; and that the trust-estate be declared unaffected by said condition, and a charge upon the testator's estate; and that the defendant be compelled to account for and pay to the plaintiff the rents and profits received from said house since the death of the testator. The defendant, Mrs. Strange, in the record, p. 77, denies that it is impossible for the plaintiff to renounce her claim to

the trust-money, and that the said condition was an unjust or unrighteous requirement, and alleges that the devise of a life-estate in said house, with the condition, ought to be accepted by the plaintiff in satisfaction of her claim for trust-moneys.

This is the substance of all the allegations, either in the bill or in the answer. It is substantially the same as the allegations in the complaint and answer in New York. Clearly it is not an *election* to accept the devise of a life-estate in a house in Memphis, worth $———, in satisfaction of a claim of $18,000 and upwards for trust-moneys, in which the plaintiff had a life-interest, with a contingent remainder to the heirs of her brother. How it could be tortured, by any ingenuity, either of courts or counsel, into an *election* to accept the devise in question in satisfaction of the claim for trust-moneys, is utterly inconceivable. The only other allegations respecting the devise of the house, apparent upon the record, are contained in a bill filed by Mrs. Carpenter against Mrs. Strange and others, in the Chancery Court of Shelby Co., Tennessee (No. 1,805), in January, 1875, before the suit in New York was commenced. Record, p. 59. They are in substance, on the part of the plaintiff, that the devise is made on the condition that the plaintiff renounce all claim upon the testator's estate for trust-moneys; that she has not renounced said claim, nor refused to renounce it, for the reason that she is advised that by virtue of said deed of trust, it is impossible for her to release said trust-funds, and for the further reason that such condition is unjust, and a most unrighteous requirement; and in her prayer in said bill, the plaintiff prays that the Court will decree that said devise be taken and held by her free from all and every condition in said will; and that the said condition be declared void, and the title be absolutely vested in complainant; and that she be relieved from renouncing any claim to said trust-money; and that the trust-estate be declared unaffected by said condition, and a charge upon the testator's estate; and that the defendant be compelled to account for and pay over to plaintiff the rents

and profits of said house since the demise of the testator; and also be compelled to account for the trust-moneys held by the testator, and that a reference be had, if necessary, to find out the amount. To which allegations the defendant, Mrs. Strange, made answer, in substance, if not identically, the same, as in her answer in the other Chancery suit, hereinbefore referred to. Record, p. 77. This bill, No. 1,805, was filed against Mrs. Strange as executrix, upon the supposition that she had qualified as such in Tennessee. It subsequently appearing that she had not so qualified, a motion was made to dismiss the bill, but by consent of both parties, it was consolidated with Bill No. 3,912. Subsequently, however, it was dismissed by order of the Court. Record, p. 89. This bill, No. 1,805, may therefore be considered as laid out of the case, and as forming no part of the record. The Supreme Court of Tennessee could, therefore, not resort to that bill or the answers to it, in support of the declarations contained in its judgment, Record, p. 106,

"That upon the pleadings, proceedings, and evidence, as the same appear in the transcript of this cause, the complainant has elected to claim, assert, and sue for a life-estate, under the devise of the same to her, in the first item of the will of A. P. Merrill."

It is not enough that the learned judges who rendered this decree assert such to be the fact; *it must appear upon the inspection of such pleadings, proceedings, and evidence by your Honors*, that the plaintiff made such election, in order to deprive your Honors of your jurisdiction over this writ of error. If it does not so appear upon the record itself, independently of any decision or declaration of the judges in Tennessee, your Honors will not find the existence of any non-Federal question, intervening to deprive you of your jurisdiction. Certainly, the bill dismissed can furnish no evidence of such election.

If your Honors will refer to the record, pp. 47 and 48, you will find that the learned judges in Tennessee were utterly precluded from asserting, as they do in their decree that the

plaintiff had made such election. It appears upon p. 47 that the defendants moved to dismiss so much of the bill 3,912, as seeks to enforce the alleged rights of complainant as a devisee, for the reason that it appears by the bill that the devise was conditioned upon the renunciation by her of all claim upon the estate of the testator for the trust-fund. That motion contains the following words:

"The bill not only fails to show a compliance with this condition, but affirmatively shows the contrary, to wit: That complainant has elected to claim and sue for said trust-fund.

"The bill shows no sufficient reason for non-compliance with said condition, nor for setting it aside as null and void. Wherefore said defendants pray judgment of so much of said bill as aforesaid, that it may be dismissed, and that defendants be not required to answer the same."

On page 48 of the record is the order of the Court upon this motion. I ask leave to recite it here in full:

"The motion of the minor defendants, by their guardian *ad litem*, to strike out so much of bill No. 3912, R. D., as sets up a claim under the will of A. P. Merrill, was this day considered, when solicitors for Mrs. Carpenter insisted that no such claim was asserted, and that for their client they disclaimed any right or purpose to hold or claim a devise under the will; whereupon said motion was overruled."

After such a disclaimer as this, made in the presence of the Court, in the only proceeding then pending in Tennessee, accepted and acted upon by the Court, of which Mrs. Strange had the same benefit as the other defendants, it is impossible to conceive what could have induced the learned judges in Tennessee to examine the pleadings, proceedings, and evidence in the cause, in order to find proof that Mrs. Carpenter had elected to accept the devise, in lieu of her claim to the trust-money. Certainly nothing exists in the *pleadings*, *proceedings*, *or evidence*, in the only suit between the parties then pending in Tennessee, which justifies the judges in say-

ing that Mrs. Carpenter had elected to accept the devise under the will in satisfaction of her claim.

No other pleadings, proceedings, or evidence are certified upon this record, except the complaint, answer, and judgment in the case tried before the Supreme Court of the State of New York, in which it appears, in substance if not in form, that this question of election was decided by that Court and forever set at rest.

Even if it arose again upon the pleadings, proceedings, and evidence before the courts of Tennessee, it was the duty of those courts to give full faith and credit to the record of the judgment, showing that the same question had been decided by the Court in New York.

In conclusion, permit me to call the special attention of your Honors to the expedient, apparently adopted by the learned judges of the Supreme Court of Tennessee, to deprive your Honors of the jurisdiction conferred upon you by the Constitution of the United States, to revise their judgment upon a writ of error.

On the 16th of April, 1887, as appears by the Record, p. 105, those learned judges rendered a decree, in which they decided that the record of the New York judgment was fatally incomplete and defective, and not duly authenticated, and that the Court of New York had no jurisdiction to declare the deed of Dr. Merrill to Mrs. Strange void. Both these questions are Federal questions. The only other question was decided in favor of Mrs. Carpenter. There was nothing therefore, in this decree, to bar the jurisdiction of your Honors upon a writ of errror.

Four days after, to wit, on the 20th of April, 1887, the same learned judges, without any apparent reason, annul the decree passed on the 16th of the same month, and pass another decree, in which they adjudge the same Federal questions against the plaintiff, and insert, in addition thereto, a decision of a question which, it is claimed, is non-Federal and is decisive of the plaintiff's case, and bars the jurisdiction of your Honors; apparently disregarding the fact that the same

question had been virtually decided in New York, and, it is to be presumed inadvertently, asserting that this question arises upon the record, whereas the record shows the contrary. Fortunately the Constitution of the United States cannot be evaded in this way. The jurisdiction of your Honors still remains to decide whether or not, upon the record, non-Federal questions appear to have been made and decided sufficient to bar your jurisdiction over the Federal questions.

My esteemed associate, the plaintiff's Attorney of Record in this cause, Mr. Henry Wise Garnett, has expressed his ideas to me on the points involved in this motion, with so much clearness and simplicity, that I beg leave to submit them to the Court. Mr. Garnett says:

"I have been carefully over the record, and, as it appears to me, the question is plain and simple. The Court in New York having jurisdiction on the bill filed by Mrs. Carpenter as a creditor, and after service, appearance, and answer by the other side, decided Mrs. Carpenter was a creditor for a certain amount, and gave judgment in her favor. On this judgment she brought suit in Tennessee as a creditor. The Court in Tennessee decided that she was *not* a creditor. This decision seems to me, contrary to the constitutional provision, and that the motion to dismiss this writ of error should fail."

FRANCIS FELLOWES,
Of Counsel for Plaintiff.

HARTFORD, CONN., January 2, 1888.

JAN 7 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1267.

ANNA M. CARPENTER

vs.

MARIA E. STRANGE, EXECUTRIX, ET AL.

BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM.

HENRY WISE GARNETT,
For Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 1267.

ANNA M. CARPENTER

vs.

MARIA E. STRANGE, EXECUTRIX, ET AL.

BRIEF IN REPLY TO MOTION TO DISMISS OR AFFIRM.

The writ of error in this cause was sued out to reverse a decree of the supreme court of Tennessee.

The plaintiff in error brought her suit, No. 3912, in the chancery court of Shelby county, Tennessee, against Maria E. Strange individually and as executrix of A. P. Merrill, deceased, and the other defendants, distributees and legatees under the will of A. P. Merrill. (Record, p. 3.)

This suit is brought by her as a judgment creditor of the said Merrill under a judgment for $16,436.70, with interest, recovered by her in the supreme court of the county and State of New York against the defendants in error, Maria E. Strange, executrix of A. P. Merrill, and William N. M. Merrill, and the object of the suit is to subject to the satis-

faction of this judgment certain real estate in Shelby county, Tennessee, belonging to the said A. P. Merrill during his life.

The duly authenticated record of the New York judgment is filed as an exhibit with the bill (Exhibit B, Record, p. 8), the certificates being on record, pp. 8, 45, and 46.

In her bill, as a judgment creditor in this case, the plaintiff in error states (Record, p. 4):

"Complainant represents she is a legatee under said will" (will of A. P. Merrill) "of the western portion of a double tenement house purchased by the testator from Adlai O. Harris, being No. 98, on Madison street, Memphis, Tenn., to be held and used by complainant, with all the income to be derived therefrom, during her natural life," with a proviso that the complainant "renounce all claim upon the testator's estate for moneys accruing from the sale of a tract of land in Illinois, conveyed to said testator in trust for complainant's benefit by Dr. W. N. Mercer.

"Complainant represents she has never renounced her claim upon the testator's estate, and has never claimed anything under said will or received anything."

It is apparent, on reading the bill in this cause, that the plaintiff in error expressly claims only as a creditor, and bases her claims and suit upon the judgment obtained in the State of New York.

But to remove any possible doubt on this point the defendants, A. A. Strange, Fannie Mitchell, and Sarah Strange, by their guardian, moved to dismiss so much of the bill as sought to enforce the rights of plaintiff in error as devisee under the will of said Merrill, and the court overruled the motion, the counsel for plaintiff in error disclaiming any such claim. (Record, pp. 47 and 48.)

The decree of the supreme court of Tennessee, which it is now sought to reverse, in brief decides (Record, p. 105):

I. That the record of the proceedings in the State of New York is fatally incomplete and defective.

II. That the court of the State of New York had no power or jurisdiction to adjudge the conveyance by A. P. Merrill to the defendant in error, Maria E. Strange, fraudulent and void as to the creditors of said Merrill.

III. That upon the pleadings, etc., in the cause the plaintiff in error has elected to claim as devisee under the will of the said Merrill, and must renounce and surrender her claim as creditor.

The second and third points are a direct review and reversal of the judgment of the supreme court of New York, and in direct violation of article IV, section, 1 of the Constitution giving full faith and credit in each State to the public acts, records, and judicial proceedings of every other State, and the decision that the plaintiff was estopped by claiming under the will was a review and a reversal of the decision of the supreme court of New York, that she claimed as and was a creditor of the testator.

The facts of the case, as shown by the record, and which assist in properly considering this motion, are set out fully in the report of the referees. (Record, pp. 91 to 99.)

Argument.

There is no assignment of errors in the record, but those to be now considered are plain on the face of the Tennessee supreme court judgment. (Record, p. 105.)

1. The first questions appearing by the judgment which have relation to the jurisdiction of this Court appear in the first few lines of the judgment, where it is stated that the record of the proceedings in the court of the State of New York is fatally incomplete and defective, in that the transcript of the records of such proceedings commences with an amended complaint, and the certificate of authentication is insufficient.

This is a refusal to give due faith and credit to the judicial records of another State, and raises two Federal questions, and is error if the record was sufficient in New York and the authentication was sufficient. The certificate at beginning of N. Y. record (Record, p. 8) states it is a full and perfect record.

As to alleged defect that the transcript begins with an amended complaint, the probable intendment was that the original complaint should have formed part of the transcript, but this is an error, for after amendment of the original complaint in New York State courts of record the amended complaint takes the place of the original, and the latter is no longer a necessary or proper part of the record, and it has been so held by the New York court of appeals.

Brown *vs.* Saratoga R. R., 18 N. Y. Rep., 405.

Furthermore, by statute of the State of New York no judgment shall be impaired or affected by any informality in entering judgment by which the adverse party has not been prejudiced (N. Y. Code, sec. 721, in operation in 1880). Of course, no party has been prejudiced, no complaint has ever been made by any party, and indeed the supreme court of Tennessee was the first to discover that the judg-

ment was fatally or otherwise defective in this regard. And as respects the alleged insufficiency of the authentication, there is not anything to show that, but on the contrary the record here shows that the authentication is in all respects in strict accord with all the requirements of the statute in such case made and provided. The clerk certifies that the record is a full and perfect record. The presiding judge certifies that full faith and credit is due to the official acts of the clerk, that the seal attached "is the seal of our supreme court," and that the attestation is in due form of law, and the clerk certified to the judge.

It thus appears that these two alleged fatal defects which appear to have constrained the Tennessee court to reject the New York judgment record, and thus deprive the plaintiff in error of every chance to establish her case, are in fact and in law no defects at all.

2. The next question arising upon the face of the Tennessee supreme court judgment is also a Federal question, wherein that court refuses to give full faith and credit to the New York judgment record by deciding that the New York court had no right to adjudge that the conveyance by Ayres P. Merrill to the said defendant, Maria E. Strange, was void as to creditors of said A. P. Merrill, and that in no event did that court have power, by force or virtue of its judgment alone, to divest, remove, or annul the claim of title under said conveyance to defendant Strange. And the decision of the Tennessee court is erroneous, too, because the New York court had that power, as is convincingly shown by Judge Fellowes argument upon this very question before the Tennessee referee's court, as appears by the rec-

ord here, wherein the referee's court quote and adopt as its own such argument *in extenso*. (Record, p. 95.)

It is true that this Federal question is not necessarily a vital one to plaintiff in error here, because its decision either way has the effect only to increase or diminish to the extent only of the value of the property covered by said deed (the homestead property), the security for the payment of plaintiff's judgment. But in this respect it may be vital to plaintiff, because it may reasonably be doubted that, without that property, the plaintiff ever can realize the amount of her judgment recovered in the New York court.

3. The next and final point or question, if it may properly be so named, would have been non-Federal if it had not been already adjudicated and so shown by the New York record, and therefore could not be passed on by the Tennessee court, and was doubtless intended to oust this court of its jurisdiction over the entire case.

The court say:

"*Upon the pleadings, proceedings, and evidence*, as the same appear in the transcript of this cause, the plaintiff has elected to claim, assert, and sue for a life estate mentioned in the devise of the same to her in the first item of the will of said A. P. Merrill in and to the property devised in said will as the west portion of the double tenement house, 98 Madison street, Memphis, Tennessee; * * * and having thus elected to claim and assert title as devisee under said will, must give effect to and perform the conditions on which said devise to her was made, and must renounce and surrender her said claim against the testator's estate; and complainant is, therefore, entitled to recover a life estate in the premises aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the record."

The Tennessee court in thus deciding, as has been before stated, failed to give credit to the New York judgment which decided this question, but on the contrary reviewed and reversed it.

If this be really a question, it is a covering one—includes all the other questions in the case—and seems to have been conceived after the original judgment of the Supreme Court was entered, for the first judgment was annulled and set aside, and the clause in question inserted in a second judgment, which was made the final judgment of that court in this cause.

It seems to have been intended to override all the Federal questions and to have been carelessly, even recklessly, decided without regard to the law or the facts.

It ignores the equities of the case, which are obviously all in favor of the plaintiff in error here, and states as matters of fact that which does not at all appear on the face of the record so to be.

An examination of the pleadings fails to develop any instrument, deed, declaration, admission, or consent, express or impliable or conditional, looking to any election, claim, assent, or suit for any life estate.

It is true that in her complaint in the New York suit (Record, page 12) the plaintiff refers to said devise, but she alleges that she has not renounced her claim as required to by said devise, and adds that it is impossible for her to release the trust fund, and that the condition that she release it is against conscience and justice, and cruel and unlawful, and "an attempt to commit this cruel fraud" upon her, and that said life estate is of little value.

And it also appears in her prayer to the same complaint

that she prays to have such devise free from all and every condition, and that such conditions be decreed to be void, and the title to the life estate be absolutely vested in her, and that she be released from renouncing any claim for said trust money, &c.

And it also appears by the attachment and creditors' suits in Memphis that plaintiff again refers to such devise and states there that she has not renounced her claim upon the testator's estate and has never claimed anything under said bill or received anything.

And it also appears in the referee's court judgment in Tennessee that such court, referring to such devise, adjudge that she has in effect *renounced all claim to the devise.* (Record, page 94.)

It appears also in the answer of defendant Strange, as executrix in the New York suit, referring to complaint of plaintiff, and her statements above mentioned respecting said devise of the life estate and its value in defendants' estimation, that she asks that the devise be adjudged lawful and equitable and be permitted to stand and to have been intended by testator to be in full satisfaction of all plaintiff's demands, and if plaintiff elect or be adjudged to take the life estate that she release to executrix Strange, and to her individually, all claim as in said last will provided.

And this is all that the pleadings or proceedings or evidence show upon which the Tennessee court bases its remarkable statement that the plaintiff "has elected to claim, assert, and sue for a life estate under the devise of the same to her in the said will of A. P. Merrill," while in opposition to that assumption we have the whole drift, object, and intent of her suit appearing in every page throughout the

record to be to recover the money demand and *not* the life estate.

And therefore we contend that there is no basis in fact for the proposition in question. There are no facts, and there is no fact to support it. It is baseless—a question *in nubibus*—an imaginary question. It lacks substance—it is insufficient; and this Court, conservative as it is and has been ever in the matter of assuming jurisdiction in any case not fully authorized by the statute, has yet to deny to a suitor in this Court, upon any such bald pretext, the right to review the proceedings of a State court; and, again, it is in conflict with the decisions of this Court, that the mere *ipse dixit* of State-court judges that a question—any question—exists unless the question alleged to exist appears by the record actually to exist.

It is respectfully submitted that the motion should be denied.

HENRY WISE GARNETT,
For Plaintiff in Error.

FILED,
MAR 21 1891
JAMES H. MCKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 267.

ANNA M. CARPENTER

vs.

MARIA E. STRANGE, EXECUTRIX, ET AL.

ON APPEAL FROM SUPREME COURT OF TENNESSEE.

BRIEF OF PLAINTIFF.

JAMES M. BALDWIN,
HENRY WISE GARNETT,
Attorneys for Appellant.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 267.

ANNA M. CARPENTER

vs.

MARIA E. STRANGE, EXECUTRIX, ET AL.

ON APPEAL FROM SUPREME COURT OF TENNESSEE.

BRIEF OF PLAINTIFF.

The writ of error in this cause was sued out by plaintiff to reverse a decree of the supreme court of Tennessee reversing a judgment of the referee's court of that State in part affirming and in part reversing a decree of the chancery court of Shelby county, Tennessee, in a suit brought in that court by the plaintiff in error here, as a judgment creditor, against Maria E. Strange, the defendant in error here, individually as well as executrix of the will of A. P. Merrill, deceased, and also against the other defendants, on a money judgment recovered in the State of New York by said A. M. Carpenter against said M. E. Strange, as executrix, &c., for $16,436.70 and interest, August 5, 1880.

The duly authenticated record of that judgment appears at folios 30 to 182 of the transcript of record to this Court.

The object of the Shelby county chancery suit was to subject the real property in that county belonging to the estate of Ayres P. Merrill, deceased, to the satisfaction of said New York judgment.

The other facts pertinent to this appeal are set forth in the Transcript of Record, at pages 91 to 94.

There is no assignment of errors in the record, but those to be considered appear on the face of the Tennessee supreme court decree. (Record, pp. 105 & 106.)

ARGUMENT.

I.

The first error in the Tennessee supreme court decree is that wherein it is stated that the record of the proceedings in the court of the State of New York is fatally incomplete and defective (1st) in that the transcript of the record of such proceedings commences with an amended complaint, and (2d) because the certificate is insufficient.

This is not only a refusal to give due faith and credit to the judicial records of another State, in violation of the Constitution of the United States, but it is also erroneous, because the original complaint, having been amended, was no longer properly a part of the record and was superseded by the amended complaint, which took the place of the original complaint, and thereupon the latter ceased to be a proper part of the record, as has been held by the New York court of appeals.

Brown *vs.* Saratoga R. R., 18 N. Y. Rep., 405.

And, furthermore, even if that decision did not exist, the Code of Civil Procedure of that State, section 721, in force in

1880 provided that no judgment should be impaired or affected by any informality in entering judgment by which the adverse party had not been prejudiced. Of course, no party had been prejudiced or could be by omitting a useless pleading, and indeed the Tennessee supreme court's decision that the New York judgment was fatally defective in this regard seems to have been an original conception of that court.

Secondly, as respects the alleged insufficiency of the authentication, no insufficiency exists, but the contrary is completely shown on page 8 of the Record, where the authentication begins, at folio 30, and continues on pages 45 and 46, folios 180, 181, and 182, where it ends, and whereby it will be seen that the authentication of the record is in due and ample form.

II.

The next error arising upon the face of the Tennessee supreme court decree, like those already considered, is a Federal question, because that court refuses to give full faith and credit to the New York judgment record by deciding that the New York court has no right to adjudge that the conveyance by Ayers P. Merrill to defendant Maria E. Strange was void as to creditors of said A. P. Merrill, and that in no event did that court have power, by force or virtue of its judgment alone, to divest, remove, or annul the claim of title under such conveyance to defendant Strange (Record, p. 105, fos. 400 and 401).

The supreme court of Tennessee not only erred in refusing, as above mentioned, to give full faith and credit to the New York judgment, but, as matter of law, the New York court *had* that power which the Tennessee court states it had not. This is convincingly shown by the argument of Judge Fellowes upon this very question before the Tennessee referee's court, as appears by the record here, wherein

the referee's court quote and adopt as its own such argument *in extenso*. (Record, pp. 95, &c., fos. 359 to 377.)

III.

The third question arising upon the face of the Tennessee supreme court decree is stated therein (Record, p. 106) as follows:

"Upon the pleadings, proceedings, and evidence as the same appear in the transcript of this cause, the complainant has elected to claim, assert, and sue for a life estate under the devise of the same to her in the first item of the will of said A. P. Merrill in and to the property described in said will as "the western portion of the double tenement purchased by Alai O. Harris, being the house and lot No. 98 on Madison street, Memphis, Tennessee," and that by the terms of said will said devise to complainant was made upon condition that said complainant should renounce and surrender the claim against the estate of said testator for which she sues in these proceedings, and that complainant, having thus elected to claim and assert title as devisee under said will, must give effect to and perform the condition upon which said devise was made, and must renounce and surrender her said claim against the testator's estate. Complainant therefore is entitled to recover a life estate in the premises aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the record."

Now the Tennessee supreme court in thus deciding failed to give due faith and credit to the New York judgment which decided this question, and, on the contrary, the Tennessee court reviewed and reversed it, and the above-quoted matter, it may be noted here, seems to have been, as it were, an after thought of that court, because not anything like it appears in its first judgment (Record, p. 104, fos. 397 and 398), which was vacated and the other (Record, p. 105, fo. 399, &c.) substituted with the provision above quoted.

Without this question there was no room for doubt that

all the questions appearing upon the face of such Tennessee supreme court decree were Federal questions.

It seems to have been intended by this provision to override all the Federal questions and to take the case out of the jurisdiction of the United States Supreme Court, and obviously it ignores the equities of the case, which are all in favor of plaintiff in error here.

But what is most important for present consideration and disposition of the matter is the fact that an examination of the pleadings fails to reveal any instrument, deed, or declaration, admission or consent, express, impliable, or conditional, looking to an election, claim, assent, or suit for any life estate.

It is true that in her complaint in the New York suit (Record, p. 12) plaintiff refers to the devise to her (fo. 46), but she alleges (fo. 47) " that she has not renounced said claim so as aforesaid required to do, nor has she refused to renounce said claim, for the reason that she claims that by virtue of the deed of trust it is impossible for her to release said trust funds, and for the further reason that such a condition as aforesaid required is against conscience and justice," and at folio 48 plaintiff also states "said life estate is of little value."

So is it also true that by her prayers to the same complaint (fo. 53) plaintiff prays to have such devise free from all condition, and that such condition be held to be void, and that the title to the life estate be absolutely vested in plaintiff, and that she be relieved from renouncing any claim for said trust money, and that the trust estate be declared unaffected by any condition in said will and a charge upon the estate of said testator.

And it also appears by the attachment suit in Memphis (Record, p. 62, fos. 236 and 237) and by her creditor's suit in Memphis (Record, p. 4) that she has never claimed or received anything under said will.

And it also appears by the said referee's court judgment

that such court adjudged that complainant has by her bill elected to sue for the claim or trust fund due her, and not to accept the bequest with its conditions, and claims nothing under the will, and there is nothing in her bill filed in 1875, under the facts of the case, to estop her from relying on and claiming under the New York judgment. (Record, p. 94, fo. 358.)

And it also appears by the answer of defendant Strange, as executrix, in the New York suit, referring to complaint of plaintiff and her statement above mentioned respecting such devise of the life estate and its value, that such executrix asks that the devise be adjudged lawful and equitable and to be permitted to stand and to have been intended by testator to be in full satisfaction of all of plaintiff's demands, and if plaintiff elect or be adjudged to take the life estate that she release to executrix Strange and to her individually all claims as in said last will provided.

And this is all the pleadings, proceedings, or evidence shows upon which the Tennessee Supreme Court bases its remarkable statement above quoted, while in opposition to that we have the whole object and intent of plaintiff's suit, appearing everywhere throughout the record, to be to recover the money demand and *not* the life estate.

There is therefore no basis in fact for this proposition. There is no fact to support it; it is baseless and imaginary, and this court, conservative as it ever has been in the matter of assuming jurisdiction in any case not authorized by the statute, has yet to deny to a suitor upon any such bald pretext the right to review the proceedings of a State court. And, furthermore, it is in conflict with the decision of this Court that the mere *ipse dixit* of State court judges that a question exists shall be assumed to exist unless the question alleged to exist appears by the record actually so to do.

It may be added that it is plain on reading the bill in this cause (Record, page 3, &c.) that the plaintiff in error claims

only as a creditor and bases her claim and suit upon the judgment obtained in the State of New York.

And any possible doubt upon the subject is further removed by the action of the defendants A. A. Strange, Fanny Mitchell, and Sarah Strange, who, by their guardian, moved to dismiss so much of the bill as sought to enforce the rights of plaintiff in error as devisee under the will of said Merrill, and the court overruled the motion, the counsel for plaintiff in error disclaiming any such claim.

Record, pp. 47 and 48.

JAMES M. BALDWIN,
HENRY WISE GARNETT,
Attorneys for Appellant.

FILED
APR 1
JAMES, H. McKE
CL

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 267.

ANNA M. CARPENTER,

vs.

MARIA E. STRANGE, EXECUTRIX, ET. AL.

ON APPEAL FROM SUPREME COURT OF TENNESSEE.

BRIEF OF PLAINTIFF IN REPLY TO BRIEF FOR DEFENDANT IN ERROR.

JAMES M. BALDWIN,
HENRY WISE GARNETT,
Attorneys for Appellant.

THE PRESS PRINTING AND PUBLISHING CO., PATERSON, N. J.

In the Supreme Court of the District of Columbia.

No. 267.

A. M. CARPENTER

vs.

M. E. STRANGE, ET AL.

BRIEF IN REPLY TO BRIEF FOR DEFENDANTS IN ERROR:

It is admitted by the Defendants in Error from their argument that there is a Federal question in this case, but they argue that the decision is sufficiently broad to support the judgment even if the Federal question was decided erroneously. They based this argument upon the part of the decision in which the Court of Tennessee decided that the Complainant in Error had elected to claim under the Will as devisee. It is respectfully submitted that the record does not show any question before the Court below upon which it could base its opinion.

A decree given partly upon a supposed case which is against and outside of the record cannot be relied upon as

a decision which will sustain the case ouside of the point involving Federal Jurisdiction.

The Counsel for the Defendants in Error has argued the case as if it had been begun in Tennessee by the Bill filed on January 15th, 1875, in Shelby County, Tennessee. That Bill commences on the 59th page of the Record and concludes on the 64th. It is expressly on its face for the purpose of obtaining an attachment of the real estate, and the plaintiff prays among other things as follows:—

"And Complainant prays that said real estate so attached be held to secure the recovery that Complainant may recover on account of this suit or any other one Complainant has brought or may bring on account of the premises?"

In the Bill filed in 1881 commencing on the 3d page of the Record the Complainant on the 4th page of the Record refers to this suit of 1875 and states that it was really ancillary and auxiliary to the suit in New York. It is therefore evident from the Record that the real suit between the parties was pending in New York previously to the filing of the Bill seeking an attachment which was filed in 1875. At the time of the filing of the suit in New York and also at the time of the recovery of the judgment therein both the Defendant and the Complainant were residing in New York and the Court therefore had jurisdiction over the person of the Defendant.

This appears in the Record on page 92, marginal paging 248.

Again from the Record it appears that the attachment suit was dismissed by the Chancellor and the Appeal from the decree dismissing it was appealed over by the Complainant. In that suit of 1875 the Appellant expressly claims as a creditor and on page 62 states that she has not renounced her claim, and on page 63 states that her claim then amounts to over $10,000.00, and the whole object of the suit is to enforce this claim.

The suit in New York as appears by the Bill was also to enforce the claim. In the Bill of 1881, on page 4 of the Record, she represents that she has never renounced her claim and has never claimed anything under the Will or received anything.

Again on page 47 of the Record, the guardian ad litem of the infant Defendants in the Bill of 1881 moved to dismiss the Bill because the Complainant had not renounced all claim under the Will, and on page 48 the Complainant in open Court by her Counsel disclaimed any right or purpose to hold the claim and devise under the Will.

From these and other facts appearing on the Record it is plain that the question of election was not before the Supreme Court of the State of Tennessee and that Court could not by passing upon that question take away from this Court the right or power to pass upon the Federal question involved in this case.

Mr. Francis Fellows, now deceased, who as Counsel with appellant, filed a brief on the motion herein "to dismiss or affirm," at pages 4 & 5 of his brief states succiently and correctly as follows:—

"It is manifest therefore that if the Supreme Court of Tennessee had given full faith and credit to the judgment in New York, as required to do by the Constitution and Laws of the United States, they never could have inserted in their decree, as a now Federal question, that the plaintiff had elected to accept this devise as a satisfaction of her claims.

When therefore the New York record was presented to the Courts of Tennessee, there was no question of right open between the parties, except such as related to the assets wherewith to satisfy the claims of the plaintiff. The bill, which the Supreme Court of Tennessee finally decided, was in the nature of an action upon a judgment filed for the purpose of enforcing the judgment, by apply-

ing the assets of the testator to the satisfaction of the recovery obtained in New York.

By the New York record, the question whether or not Mrs. Carpenter's prayer that the devise should be decreed to her as absolute, free from the condition attached to it, was within the issue; and even if not decided in terms, was decided in fact, and became *res adjudicata*, since every matter within an issue, is deemed to be decided, whether specifically named in the decision or not. The prayer was not granted, it was therefore in legal effect denied. Mrs. Strange's prayer also, that Mrs. Carpenter should be required to accept the devise, with the condition, in satisfaction of her claim for trust money, was not granted. It was therefore in legal effect denied. By the very terms of the judgment, also, that the plaintiff recover the amount of the trust moneys, the question of this devise and of the plaintiff's action in respect to it as a bar to recovery, was forever settled, and when the record of this judgment was presented to the Court of Tennessee, it had no jurisdiction to decree that the plaintiff had elected to accept the devise as a satisfaction of her debt.

The only question was whether full faith and credit should be given to that record and judgment in obedience to the laws and Constitution of the United States. This was a Federal question purely, and not a question by the decision of which the Supreme Court of Tennessee could evade the jurisdiction of your Honors, to revise their doings on this writ of error."

As has been already shown both the Appellant in Error and the Defendant were residents of the State of New York at the time the suit was brought there. Personal service was therefore obtained against the Defendant in Error in that suit, and she appeared and answered and the Court there having full jurisdiction over her person Decreed that the deed of 1867 to her of the house in Memphis was

fraudulent and void as against the creditor of the estate who is now the Appellant in Error.

Whatever criticism might be made upon the form of this part of the decree, it is certainly a decree in pursuance of the rule and recognized power of the Court of Chancery as is shown by the cases in this Court, and is binding upon the Defendant in Error.

In the case of Hart vs. Sansom referred to by the Counsel for the Defendant in Error in his brief—110 U. S. page 154, this Court uses the following language:—

"Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the Court over the parties, by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment in rem, establishing a title in land, but operates in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be cancelled, or to execute a release to the plaintiff. Langdell Eq. Pl. (2d ed.) sec 43, 184; Massie v. Watts 6 Cranch, 148; Orton v. Smith, 18 How. 263; Vandever v. Freeman, 20 Tex. 334."

And the attention of the Court is called to the fact that the decree is now in Tennessee being enforced against the same defendant over whose person the New York Court had jurisdiction at the time it was rendered. The Appellant in Error also calls the attention of the Court to the argument as to this point which was adopted by the Court of Referees in Tennessee in their report commencing on page 95 and concluding on page 99 of the Record.

JAMES M. BALDWIN,
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JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

A. M. CARPENTER
vs.
M. E. STRANGE, *et al.*
No. 287.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

W. HALLETT PHILLIPS,
For Defendants in Error.

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In the Supreme Court of the United States.

A. M. CARPENTER
vs.
M. E. STRANGE, *et al.*
No. 267.

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

Brief of W. Hallett Phillips for Defendants in Error.

THE JURISDICTION.

A motion to dismiss, made at a previous term, was postponed until the case was reached on the regular call.

The want of jurisdiction of this Court is clear upon the face of the record.

It is contended that the judgment involved a federal question; held adversely to the plaintiff in error.

While it may be that, in its decision, the court passed upon a question of that nature, there was also decided a question of general law sufficiently broad to support the judgment, even if the federal question was decided erroneously.

Whenever the judgment of a state court can be sustained on any proposition found in the record, of which the state court has exclusive jurisdiction, it

can not be reversed, even if some point subject to re-examination in this court was erroneously determined.

If the non-federal point is broad enough, the judgment must stand without inquiry into the soundness of the decision.

Murdock vs. *Memphis*, 20 Wall., 596;
Citizens' Bank vs. *Board of Liq.*, 98 U. S., 140.

In such a case it was not necessary for the court to have gone further or decided a federal question. The fact that it may have done so furnishes no reason for the exercise of the revisory power of this Court.

Moore vs. *Mississippi*, 21 Wall., 638.

No principle has been more frequently announced.*

A Federal question is claimed to exist by reason of the alleged denial of full faith and credit to a judgment recovered in New York by the plaintiff in error.

But there was one ground on which the Supreme Court of Tennessee based its decision, which had no connection whatever with the New York judgment. The Court held that the plaintiff in error could not

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*We give some of the cases recently decided, to show how often of late the Court has been called upon to repeat the rule:

Brooks vs. *Missouri*, 124 U. S., 394;
Chicago & Alton R. R. vs. *Wiggins Ferry*, 119 U. S., 617;
New Orleans Water Works Co. vs. *La. Sugar Co.*, 125 U. S., 19;
De Saussure vs. *Guillard*, 127 U. S., 216;
Moore vs. *Brinkly*, 129 U. S., 181;
Hale vs. *Akers*, 232 U. S., 554;
Kreiger vs. *R. R.*, 125 U. S., 46;
Hopkins vs. *McLure*, 133 U. S., 380;
Blount vs. *Walker*, 134 U. S., 613;
Beatty vs. *Benton*, 135 U. S., 252;
Johnson vs. *Risk*, 137 U. S., 396.

recover as a creditor of the estate of her father, Merrill, because she had elected to claim under his will as devisee. The will contained the following clause:

"I will and bequeath to my daughter, Anna Mercer (the plaintiff in error), the western portion of the double tenement purchased of Addie O. Harris, being the house and lot numbered ninety-eight (98) on Madison street, in Memphis, Tennessee, to be held and used by her, with all the income derived therefrom, during her natural life, but upon condition that she renounce all claim upon my estate for monies accruing from the sale of a tract of land in Illinois, conveyed to me in trust for her benefit by Dr. W. N. Mercer, a considerable portion of which monies were lost by depreciation during the late war, and the balance paid over to the late Walter Goodman, then her trusted friend and agent, to be invested for her benefit in Mississippi." R., 7.

In addition, the court held, that the transcript of the judgment sued on was fatally defective, inasmuch as it commences with an amended complaint, and the certificate was insufficient. That, looking to the merits, the judgment was void, in so far as it undertook to annul a conveyance of real estate situated in Tennessee, made by the testator in his life time to the defendant in error, Mrs. Strange. R. 105.

It will be perceived that the first mentioned ground is sufficient to dispose of the case, and that the judgment of the Supreme Court of Tennessee would have been the same, if the alleged federal grounds had been decided in favor of, instead of adversely to, the plaintiff in error.

On her behalf, it is argued, that, the question of election was one of the questions necessarily involved in the New York judgment, and therefore it is a Federal question.

This statement is negatived by the record.

The course of proceeding, shows the facts, from which the court below, found that the plaintiff in error had elected to claim as devisee.

In 1873 Dr. A. P. Merrill died, in New York, where he was then residing. Previous to his removal to New York, he had been a citizen of Tennessee, where all his real property was situated.

By his will he appointed as his executrix his daughter, Mrs. Strange, who is the defendant in error.

She probated the will in New York, and letters testamentory for that State were issued to her, as executrix, in February, 1874. R. 44.

She did not obtain probate of the will in Tennessee nor obtain letters in that State until January, 1881. R. 51, 85, 87, 94.

In January, 1875, the plaintiff in error, Mrs. Carpenter, who was also a daughter of Dr. Merrill, filed her bill, No. 1805, in the Chancery Court of Shelby County, Tennessee, against her sister, Mrs. Strange, as executrix and a resident of the State of New York.

In this, complainant sought to recover from the estate, a debt claimed to have been due her by her father, by virtue of a deed of trust created in 1857.

She also sets forth the devise made in her father's will. She alleges that she had not renounced her claim against the estate, as required to do by the condition of the devise, nor had she refused so to renounce, for the reason, that she could not renounce it and for the further reason that the condition was unjust.

Among the prayers is one that the Court would "decree that the bequest of said life estate in and of said house so as aforesaid bequeathed, be taken and held by complainant free from all and every condition in said will, and said condition be decreed to be void and the title to be absolutely vested in complainant, and she be relieved from renouncing any claim from said trust money."

She also prayed that the conveyance of the house and lot made by the testator to her sister, Mrs. Strange, be set aside and declared void. R. 63.

This bill was answered by Mrs. Strange, October 22, 1875 R. 73.

Subsequently in 1878, Mrs. Carpenter filed an amended complaint against Mrs. Strange *as executrix*, in the Supreme Court of New York, In this she sought to recover a judgment against the executrix for the debt alleged to be due he plaintiff, by the testator.

As to the devise she makes the same statement, as she had previously made in bill No. 1805 in the Tennessee Chancery Court. The prayers are also substantially the same. R. 9–14.

There was a judgment in favor of plaintiff for $16,436.70, as due from the estate of Merrill.

It was also adjudged that the conveyance by Merrill to Mrs. Strange was void so far as it affected the indebtedness of the estate to plaintiff. R. 44.

Mrs. Carpenter then in February, 1881, filed in the Chancery Court of Shelby County, Tennessee, a creditors bill No. 3912, against Mrs. Strange as executrix and individually and against the heirs of Merrill.

The bill seeks to enforce the New York judgment, and to subject the real estate of the testator in Tennessee to the payment of the amount found due by the judgment.

It was answered by Mrs. Strange, December 14, 1881. R. 51. An amended answer was filed February 14, 1882. R. 84.

By consent of parties the two equity causes Nos. 1805, and 3912 were consolidated, and it was agreed, that the evidence in each case, should be used in the other, and the cases should be heard together. R. 59.

Accordingly they were heard together, and the decree was made in the consolidated causes.

The Chancery Court held that the complainant was entitled to recover against Mrs. Strange, as executrix, the amount of the New York judgment.

It further held that the filing of the bill No. 3912, was an election by complainant to renounce all benefit under the will of her father. The Court held that so much of the New York judgment, as declared void Merrill's deed to Mrs. Strange, was inoperative in this cause. R. 88, 89.

Both complainant and defendant appealed to the Supreme Court of Tennessee.

There the case was heard in the first instance by the Commission of Referees.

That tribunal affirmed the decree below in so far as it was in favor of complainant. It reversed it in so far as it refused to set aside in accordance with the New York judgment, the deed made by the testator to Mrs. Strange.

It also held—

"That the complainant has, by her bill, elected to sue for the claims or trust fund due her, and not to accept the bequest with its conditions, and claims nothing under the will, and there is nothing in her bill filed in 1875, under the facts in the case to estop her from relying on and claiming under the New York judgment." R. 94.

Various exceptions were filed, by the defendants, to this report. Among other grounds of exception was one to the ruling on the question of election. R. 99.

In support of this exception it was maintained—

"That by her complaint in New York, and also by her bill filed in Memphis in 1875, complainant claims both as creditor and under the will. Claiming this under the will, though with the disclaimer accompanying that claim, we insist that she has claimed under the will and cannot claim aginst it. *Swanson* vs. *Tarkington*, 7 Heis. 612; that by claiming the devise under the will she has elected not to claim the trust fund, and that the record shows no case whatever for the revocation of that election." R., 102.

The Supreme Court of Tennessee, in the first instance, entered a decree holding that the New York transcript was incomplete, and that the New York Court had no jurisdiction to pronounce void the deed of Merrill to Mrs. Strange. They therefore reversed the decree; but the court was also of opinion that complainant was entitled to the premises devised to her by her father, Merrill.

The latter part of this decree was manifestly incomplete, as it allowed the complainant to recover the devise without any provision barring her from claiming against the estate as a creditor. Accordingly this decree was set aside and another entered. By this it was decreed:

I. That the New York judgement record was defective.

II. That aside from the objection that the record of said proceedings in the courts of the State of New York is fatally defective, as aforesaid, and looking solely to the merits of said proceedings and judgment as presented in said transcript, the said court of the State of New York had no power or jurisdiction to adjudge that the conveyance by the testator, A P. Merrill, to defendant, Maria E. Strange, was fraudulent and void as to the creditors of said A. P. Merrill, and in no event did said court have power by force or virtue of its judgment or decree alone, to divest, remove, or annul the claim of title under said conveyance by defendant, Maria E. Strange.

III. Upon the pleadings, proceedings and evidence, as the same appears in the transcript of this cause, the complainant has elected to claim, assert, and sue for a life estate under the devise of the same to her,

in the first item of the will of said A. P. Merrill, in and to the property described in said will as "the western portion of the double tenement purchased of Addie O. Harris, being the house and lot, No. 98, on Madison street, Memphis, Tennessee;" and that by the terms of said will, said devise to complainant was made upon condition that said complainant should renounce and surrender the claim against the estate of said testator, for which she sues in these proceedings, and that complainant having thus elected to claim and assert title as devisee under said will, must give effect to and perform the condition upon which said devise to her was made, and must renounce and surrender her said claim against the testator's estate.

Complainant, therefore, is entitled to recover a life estate in the premises aforesaid, but is not entitled to recover upon her alleged money demand against the testator's estate, as shown in the record.

IV. The several questions arising upon the record touching the alleged bar of the Statute of Limitations, the force and effect of the money judgment, rendered in the Court of New York in favor of complainant and against defendant, Maria E. Strange, as executrix of said will, and whether said judgment if duly authenticated and admitted in evidence, would be conclusive or of *prima facie* force only against the executrix of the same in Tennessee; and the further question, whether said judgment in New York against the executrix there qualified would be of any force, either *prima facie* or conclusive, as against the heirs and devisees of the realty in Tennessee, or whether the said proceedings in New York would, as against said heirs and devisees, operate to arrest the running of the Statute of Limitations of this State, the Court does not deem it necessary here to pronounce any opinion."

It was to reverse this decree, that the complainant sued out the present writ of error.

It is said that the jurisdiction can be supported, on the ground that the question of election, was *res judicata* by the New York judgment, because it was one of the questions raised in that cause. That if not decided in terms, it was decided in fact, since it was within the issues.

The judgment of the Supreme Court of New York avoids carefully the question raised by Mrs. Carpenter's prayer, in which she sought to recover the devise but escape its condition. There was no decision at all on this point.

The court confined itself to giving a money judgment in favor of Mrs. Carpenter subjecting to her claim the property conveyed by the testator to Mrs. Strange.

But the question of election has previous to the New York suit, been raised in the Tennessee court by the bill No. 1805, filed by Mrs. Carpenter. When that cause was consolidated with the suit brought on the New York judgment, the question was one which could be and was decided by the Tennessee court, entirely independent of the New York judgment.

The court of first instance was of opinion from the proceedings, including bill 1805, that the complainant had not elected to sue for the devise.

The Supreme Court of Tennesses was of a contrary opinion.

It is not for this court to decide which of these tribunals was correct.

The question was one raised in the cause and necessarily decided.

As has been observed by this court:

"The doctrine of election rests upon the principle that he who seeks equity must do it, and means, as the term is ordinarily used, that where two inconsistent or alternative rights or claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other, and so in other words, that he cannot take a benefit under an instrument and then repudiate it."

Peters v. *Bain*, 133 U. S., 695.

A question in the case, alleged to be Federal, in character, relates to the jurisdiction of the New York court, to set aside the deed made by Merrill to Mrs. Strange, of the House and lot 59, situated in Memphis, Tennessee.

As to this, the Supreme Court of Tennessee held, that the New York court, did not possess the jurisdiction by force of its judgment alone, to divest or annul the title of Mrs. Strange, under the conveyance.

It is well settled, that the constitutional requirement as to the effect to be given to judgments of sister States, does not preclude an enquiry into the *jurisdiction* of the court rendering the judgment.

127 U. S. 292, *Wisconsin* v. *Pelican Ins. Co.*

The faith and credit to be given to a judgment of a sister State, relate to the effect of such judgment as evidence, and do not preclude a court to which a judgment is presented for affirmative action, from inquiring whether the claim is really one that the court is authorized to enforce.

The New York judgment could not operate as a divestiture of the title of Mrs. Strange. In so far as it attempted this, the judgment was void for want of jurisdiction.

The suit against Mrs. Strange was wholly against her in her *representative*, not personal, capacity.

But if the New York court had any jurisdiction in *personam*, as concerns the title to the land owned by Mrs. Strange individually, the jurisdiction could only extend to the extent of compelling her to make a conveyance or take other personal action.

This was not attempted to be done. It is by force of the judgment alone, that the title of Mrs. Strange is claimed to have been divested.

It is said, that this case does not present a question of title to the Tennessee real estate, but is one to enforce a trust, and to cancel a claim respecting it. To that extent it is said the judgment is conclusive.

But it is impossible to escape the conclusion that the question was one of title.

The claim of the plaintiff against the decedent, it is true, originally arose out of property held in trust by him. The property was sold by the decedent many years prior to his death. The suit was one to make his estate responsible for the debt.

The plaintiff had the same right and no other as any creditor had to attack the title and conveyance to Mrs. Strange.

The land thereby conveyed was not embraced in the trust and has no connection with it.

It was an independent title the validity of which

rested on its own grounds. These could only be disposed of by a suit in the courts of the State where the land was situated, or by some direction in *personam*, by a court having jurisdiction over the person.

If such a direction had been given by way of commanding a conveyance or otherwise, the title would only have been divested by the conveyance; and not by the judgment.

"A court of chancery, acting *in personam*, may well decree the conveyance of land in any other State, and may enforce their decree by process against the defendant. But neither the decree itself, nor any conveyance under it, except by the person, in whom the title is vested, can operate beyond the jurisdiction of the court."

Watkins v. *Holman*, 16 Pet., 57.

A court cannot, by mere force of its decree, annul a deed or transfer the title to land lying without its jurisdiction.

In the ordinary exercise of its jurisdiction, a court of equity acts *in personam* by compelling a deed to be executed or cancelled by or on behalf of the party.

Corbett v. *Nutt*, 10 Wall., 575.

Hart v. *Sansom*, 110 U. S., 155.

The jurisdiction which a court of equity can exercise as to foreign real estate, depends upon some privity being shown between the parties, arising from contract, or a fiduciary relation.

Chancellor Zabriskie thus states the rule, in *Davis* v. *Headley*, 7 C. E. Green, 115.

"I find no case in which a Statute, judgment, or proceedings in one country has been held to affect such property when situate in another country or beyond the jurisdiction of the sovereign or court making the statute or decree. Courts of equity in England and America, by a long series of decisions, from that of Lord Hardwicke in *Penn* v. *Lord Baltimore*, (1 Ves. 444), to this time, have decreed the performance of contracts relating to land without their jurisdiction. But in these cases it is admitted, as it was by Lord Hardwicke, that these decrees could not affect the land, but could only be enforced when the court had jurisdiction of the person of the defendant, and thus compel him actually to execute the conveyance. *In such cases, it is the conveyance not the decree, that has the effect.*"

In that case, the Circuit Court of Kentucky having decreed that a conveyance of certain property in New York should be rescinded, the possession restored, and the defendant enjoined from asserting the conveyance, a bill was filed in New Jersey to enforce the decree. It was held that the Kentucky Court had exceeded its jurisdiction and consequently the bill was dismissed.

Mr. Westlake states that the claim to affect foreign lands through the person of the party, must be strictly limited in those cases in which the relief decreed can be entirely obtained through the *parties personal obedience.* If it went beyond that, the assumption would not only be presumptuous but inefectual. Westlake Private International Law, art. 65 (1858).

And he adds that the court will not try any question which does not involve a special equity between the parties, but is a general one affecting the land, and

therefore solely dependant on the *lex situs*, on which law another tribunal than its own can only pronounce incidentally and not directly.

In support of the jurisdiction, reliance is placed on Massie *vs.* Watts, 6 Cr. 148.

The decision in that case was based on Penn *vs.* Lord Baltimore, and it involved the same principle.

A suit was instituted in the Circuit Court of Kentucky to *compel a conveyance* by the defendant of the legal title to land in Ohio, on the ground that he had notice when it was purchased, of the prior equity of the complainant.

The Supreme Court held that as the defendant was equitably bound to convey the land, equity would enforce the fulfillment of this obligation, without regard to the place where the land was situated.

That in a case of fraud, of trust, or of contract, the jurisdiction of a Court of Chancery is sustainable wherever a person is found, although lands not within the jurisdiction of the Court may be affected by the decree.

The decree was in accordance with the prayer.

This decision only announced the general rule which had been previously declared by Lord Hardwick.

Suits affecting the title to real property are local. But a court of chancery, having jurisdiction *in personam*, may act indirectly and under qualification upon foreign real estate by reason of this authority over the person. But it can only compel the defendant to give effect to its decree by a con-

veyance, release, or other instrument, transferring the title to such property.

It must enforce obedience by process *in personam.*

North Ind. R. R. Co. vs. *Mich. Cen. R. R. Co.*, 15 How., 243;
Muller vs. *Dows*, 94 U. S., 449;
Pennoyer vs. *Neff*, 95 U. S., 723;
Phelps vs. *McDonald*, 99 U S., 308;
Cole vs. *Cunningham*, 133 U. S., 117.

For further discussion on this point, we refer the court to the argument of Mr. Craft, as contained in the Record, p. 103.

We therefore submit that the decree of the Supreme Court of Tennessee was clearly right in holding that the New York court did not have power, by force of its judgment alone, to divest the title of Mrs. Strange under the conveyance to her. The judgment should be affirmed, if the writ of error is not dismissed.

W. HALLETT PHILLIPS,
for Deft's in Error.